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AMERICAN BAR ASSOCIATION

JOVRNAL

VOL. XX SEPTEMBER, 1934 NO. 9

The Bar's Opinion on Judicial Selection

Criminal Law Enforcement in Our Cities

"A River is a Treasure"

BY WILLIAM R. KELLY

The National Housing Act Explained

BY JAMES N. MacLEAN

Review of Recent Supreme Court Decisions

BY EDGAR BRONSON TOLMAN

Mr. and Mrs. Haddock

BY HAMILTON VREELAND, JR.

Trend of U. S. Supreme Court Decisions Affecting Rates of Public Utilities

BY JOHN L. COLLINS

AUG 23

Published Monthly by American Bar Association at 1140 North Dearborn Street, Chicago, Illinois.
Entered as second class matter Aug. 25, 1930, at the Post Office at Chicago, Ill., under the Act of Aug. 24, 1912.
Price: Per Copy, 25c; Per Year, $3; To Members, $1.50.

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JOVRNAL

VOL. XX SEPTEMBER, 1934 NO. 9

Program for Milwaukee Meeting

THE program for the Milwaukee meeting was printed in practically its final form in the August issue of the JOURNAL and has, in addition, been sent out in the pamphlet containing committee reports to all members of the Association. It was therefore not thought worth while to reprint it in this number. However, a few changes have been made, as follows:

Mr. Oscar Lee, Warden of the State Prison at Waupun, Wis., and former President of the American Prison Association, will address the Section of Criminal Law on Wednesday evening, Aug. 29, on "Prison Administration and Law Enforcement." Dr. Walter N. Thayer, Junior Commissioner of Correction of the State of New York and also a former President of the American Prison Association, will address the Section at the same session on "Promoting Protection of Public through a Constructive Prison Program." Mr. James A. Johnston, Warden of the Federal Penitentiary at San Francisco, and Mr. Lewis E. Lawes, Warden of Sing Sing Prison, who were scheduled to deliver addresses at this meeting of the Section, have found it impossible to be present.

Dean Charles E. Clark, of the Yale Law School, will address the Section of Legal Education on Thursday morning, Aug. 30, on "Making Selective Admission to the Bar Practicable." Dean Henry M. Bates, of the University of Michigan Law School, whose name appears on the program for this meeting of the Section as printed in the Journal, will not be able to deliver the address there scheduled.

There will be a luncheon meeting of the "Friends of the Law Library of Congress" at 12:30 P. M., Friday, Aug. 31, at the Schroeder hotel. There will be an address by Mr. John T. Vance, the librarian.

Missouri Supreme Court Orders Three St. Louis Trust Companies to Desist from Unlawful Practice of Law

IMPORTANT decisions relating to the practice of law by certain St. Louis trust companies were handed down by the Supreme Court of Missouri at the May term. The proceeding against the companies was an original one by information in the nature of quo warranto. The Court decided in the case of State of Missouri, ex. inf. Franklin Miller, Circuit Attorney of the City of St. Louis, vs. St. Louis Union Trust Co., that "upon the pleadings and evidence we are constrained to hold that respondent has usurped rights and privileges not conferred upon it or warranted by law, in that it has engaged in 'law business' in violation of the statutes of this State as charged in the information. In view of this conclusion we reserve ruling upon the question of respondent's amenability to law independent of the statutes."

Following this conclusion, the Court's opinion, by Atwood J., states that "it appears from the whole record that this proceeding was ably, fairly, vigorously and in good faith conducted on both sides for the purpose of determining what respondent could lawfully do and what it could not lawfully do in the premises pleaded. The prayer of relator's information asks neither ouster nor fine herein. The character of judgment in a quo warranto case is largely within the discretion of the court. (Citing cases). We think that the evident purpose of this proceeding will be best served by imposing a nominal fine and costs upon respondent and in other respects following the prayer of the information. Therefore it is ordered and adjudged that respondent pay a fine of One Dollar and the costs herein, and that respondent henceforth cease and desist from the aforesaid illegal practices and conduct its business according to law on penalty of the forfeiture of its corporate charter and franchise."

The decision turned on the application to the facts of certain sections of the Revised Statutes of the State defining the "practice of law" and "law business" (Sec. 11692 R. S. 1929) and forbidding any unauthorized person or any association or corporation to engage in such practice or business, and providing a penalty for violators of the prohibition. (Sec. 11693 R. S.

1929.) The issues of law raised in the proceeding are clearly given in the following propositions stated under the relator's points and authorities: "I. Under the authorities construing statutes similar to Missouri and under the doctrines of the common law, the facts admitted by respondent and proved by the testimony constitute the doing of law business. II. The drawing or the procuring of or assisting in the drawing, for a valuable consideration, of any will or any paper document or instrument affecting or relating to secular rights need not be done in a representative capacity in order to come within the purview of the statutes. III. The trust companies, under the Missouri statute, have no incidental powers as corporations to engage in the practice of law by writing, or aiding or assisting others to write, wills. IV. Nomination of a trust company as an executor or trustee constitutes a valuable consideration within the meaning of the statutes."

The Court held with the relator on all the issues. Proceedings against the Mississippi Valley Trust Co. and the Mercantile-Commerce Bank and Trust Co., both of St. Louis, in which substantially the same questions were involved, were decided adversely to the companies and the same order to desist was entered as to them.

Large Fee Allowed by Court to Lawyers in Lengthy and Important Utility Litigation

ONE of the largest fees on record was recently allowed a Chicago firm by Judges Evan A. Evans and William M. Sparks of the United States Court of Appeals for the Seventh Circuit and Judge James H. Wilkerson of the Federal Court for the Northern District of Illinois. Sitting as a statutory court, they fixed a fee of $1,552,500 for Messrs. Benjamin F. Goldstein, George I. Haight and Edmund D. Adcock for their work in the suit against the Illinois Bell Telephone Company which was recently decided by the United States Supreme Court and which resulted in securing a refund of $20,700,000 for Illinois subscribers for four classes of coin box telephone service.

The Court fixed the attorneys fees at 7½ percent of the above amount. In doing so, according to the report in the Chicago Tribune, the Court took into consideration the fact that the lawyers carried the case to the United States Supreme Court at their own expense on an agreement that they would receive nothing unless they won. Consideration was also given to the great amount of work done by them, their standing in the legal profession and the character and quality of their work. The fee represents, we are told, the fruits of seven years of labor by the lawyers and includes payment for the supervision which Messrs. Goldstein and Haight are to exercise over the payment of the immense refund to the telephone users involved.

The fee is to be paid during the next three years and will be apportioned as agreed to in a contract, according to the terms of the Court's order. Members of the Chicago Bar state that it is the largest to be fixed by a court in this district and probably in the entire country. The only fly in the ointment for the fortunate lawyers is that the amount will be materially reduced by the high income surtaxes now prevailing.

The important litigation for the conduct of which this compensation was allowed dates back to 1923. In that year the Illinois Commerce Commission issued an order fixing telephone rates in Chicago to be charged users of certain classes of coin box service. The order affected a large part of the intra-state service of the Illinois Bell Telephone Co. The District Court, composed of three judges, enjoined the enforcement of the order on the ground that the rates fixed were confiscatory. Appeal was taken to the United States Supreme Court, the appellants being the Illinois Commerce Commission, the Attorney General of Illinois and the city of Chicago. Messrs. Goldstein, Haight and Adcock were originally employed by the Corporation Counsel of the City of Chicago but later were made officers of the Federal Court to represent the subscribers. The first two named argued the case at Washington and succeeded in having the decision reversed and returned to the lower court with direction that it make certain specific findings of fact as to the company's business, including the expense currently charged by it for depreciation of its property.

The lower court proceeded in accordance with these instructions and entered a decree permanently enjoining the rates complained of. Both the company and the Commission appealed to the United States Supreme Court, the appeal involving questions relating to several of the lower court's findings. However, the Supreme Court found that the amounts allowed by the Company for depreciation were sufficiently excessive "to destroy any basis for holding that it has been convincingly shown that the reduction in income through the rates in suit would produce confiscation." As the burden was on the utility company to prove confiscation, and it had failed to do so, the point was held determinative and it was not thought necessary to consider other questions raised by the appeal.

The decision on the first appeal, that of Smith vs. Illinois Bell Telephone Co., was reported in the February, 1931, issue of the JOURNAL, p. 104. The opinion of the Court in the second appeal (Lindheimer et al. vs. Illinois Bell Telephone Co.) is summarized in the July, 1934, issue, p. 424.

A Warning to Executors and Administrators

EXECUTORS and administrators of insolvent estates in Illinois, and no doubt in other States as well, will be interested in a warning contained in a pamphlet recently published by Hon. John F. O'Connell, Judge of the Probate Court of Cook County, Illinois.

"Despite the absence of an express provision in the Illinois Administration Statute," says Judge O'Connell, "executors and administrators of insolvent estates may incur personal liability to the United States Government for all or a part of debts due the government if such debts are not paid in full before certain other obligations of the estate are settled. A Federal statute not generally known to, or considered by, members of the Bar seems to have the effect of giving priority to debts due the United States Government from the estates of deceased persons over all obligations of the estates, excepting costs of administration and such claims as are allowable under Class 1 and Class 2 of Section 71 of the Administration Act of Illinois."

The statute in question (Sections 3466 and 3467 U. S. Rev. Stat., U. S. C. A. Title 31, Sections 191 and 192) provides first that "whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of executors or administrators, is insufficient to pay all debts due from the deceased, the debts due to the United States shall be first satisfied. . . " And it adds this warning: "Every executor, administrator or assignee, or other person, who pays in whole or in part, any debt due by the person or estate for whom or for which he acts, before he satisfies and pays the debt due to the United States from such person or estate, shall become answerable in his own person and estate, to the extent of such payments, for the debts so due to the United States, or for so much thereof as may remain due and unpaid."

Express notice of such debts delivered to the personal representative by the United States is not required to render the executors and administra-

tors liable in the case covered by the Statute. "It is merely necessary," says Judge O'Connell, "that such circumstances come to his knowledge as should reasonably put a prudent man on inquiry." (Citing U. S. vs. Clark, Fed. Cas. 14807. Circuit Court New York, 1826.) The pamphlet also deals briefly with the history of the Statute, its theory and purpose, and the Marshall decision upholding its constitutionality. It then cites various decisions showing to what claims it is applicable and others showing a few instances in which the Government priority is subordinated to other claims. On this last point it says, in part:

"It has been held in a number of federal and state court decisions that the priority of the United States must be subordinated to the priority of any valid, specific and perfected lien on the debtor's property (this has been affirmed by the United States Supreme Court) and that it is also subordinated to the reasonable costs of administration, funeral expenses and the widow's award (this has not yet been specifically affirmed by the United States Supreme Court). In the case of a partnership, the priority of the United States is subordinated, as to the partnership property, to the claims of the partnership creditors. Except for these subordinations, the priority of the United States is paramount and takes precedence even over the expenses of the last illness. It also takes precedence over the payment of debts secured by a general lien such as a judgment or a tax lien which has not been made specific, as for example, by a specific levy, sale or notice."

System of Bar Discipline and Admission Established by Rule of Court in Missouri—Canons of Ethics Adopted as Standard

RULES of Court establishing the system of Bar discipline and admission recommended by a Commission appointed by it were adopted by the Supreme Court of Missouri on July 10. The main points of the Commission's report were briefly outlined in the July issue of the JOURNAL on page 391.

The first Rule (No. 35) is to the effect that "the Canons of Ethics of the American Bar Association, as herein set forth, are hereby declared to be the measure of the conduct and responsibility of the members of the bar of this Court and of all courts over which this Court has superintending control, and the disciplinary power of the courts may be invoked for the intentional violation thereof. Nothing herein contained shall be construed as a limitation upon the power of the courts to reprimand and discipline any member of the bar for conduct which, in the opinion of the Court, is fraudulent, unlawful or unethical."

The following Rule (No. 36) deals with "Complaints and Proceedings Therein," and establishes "in each Judicial Circuit a Bar Committee to be composed of four lawyers who shall be appointed by this Court, one to serve for one year, one to serve two years, one to serve three years, and one to serve four years, and after each member's term expires his successor shall be appointed for a term of four years. Each member shall take an oath that he will fairly and impartially, and to the best of his ability, administer these rules."

The Rule adds that the first appointment of chairman will be made by the Court but that thereafter each committee will select its own chairman. It then outlines the procedure to be followed in case of complaints, which must be filed in the Circuit Court and there tried, all proceedings to be summary and without a jury and conforming, as nearly as may be, to proceedings for extraordinary legal remedies. Each side is always to have a reasonable opportunity to present evidence and to be heard, and appeals are to be allowed to the Supreme Court as in civil cases.

"In addition to the duties above imposed," the Rule continues, "the Committee in each circuit shall be constituted as representatives of the Bar of this Court, with full power to do all things which the Bar, as a class, may do to advance the standards and prestige of the Bar; and shall make inquiry from time to time as to the unlawful practice of law by persons not licensed to do so, and where, in the opinion of the majority of the Committee, the facts justify it, to instigate and prosecute, as representatives of the Bar, such actions as may be appropriate to suppress such unlawful practice."

Rule No. 37 deals with "Costs and Fees" and provides that each licensed attorney shall pay an annual fee of $3 "for the purpose of making these rules effective." Then follow various provisions as to the administration and safeguarding of the fund so collected. the purposes for which it may be drawn on being definitely set forth.

The next Rule (No. 38) deals with "Admission to the Bar." It provides that applicants must file with the Supreme Court a written application for permission to take the Bar examination, at least ninety days before the examination is held,—such application to be accompanied by the affidavits of two practicing attorneys acquainted with the applicant that he has such character and fitness as justifies his admission. It is made the duty of the Board of Law Examiners to investigate his moral character. The preliminary educational requirements are that the applicant must be a graduate of a four year high school or present proof that he possesses the equivalent of such training. But "in addition thereto all persons hereafter beginning the study of the law must have at least two years of college work or its equivalent before beginning such study." The requirements as to strictly legal education are as follows:

"No person shall be eligible for examination until he shall have devoted three full years or their equivalent to the study of law. The Court will consider as compliance with this rule completion of study in any law school fully approved by the Council of Legal Education, American Bar Association; completion of study in any law school having a three year course holding regular day sessions and approved by the State Board of Law Examiners, or four years' study in any evening law school having a four year course and approved by said Board; or three years' study in the office and under the personal supervision and direction of a practicing attorney at law; or study in a law school and in a law office sufficient to meet the above requirements."

This Rule provides for a Board of Examiners, and goes into certain details as to the time and place of holding examinations and the circumstances under which those who fail may take additional examinations.

The last Rule (No. 39) provides for the creation of a permanent Judicial Council of eleven members, nine to be appointed by the Court and the Chairmen of the Judiciary Committees of the Senate and House to be ex-officio members. The duties of the Council are those which are generally discharged by such bodies.

Committee of New York County Lawyers Association Issues Report on Selected Topics Dealing with Criminal Courts and Procedure

A THOROUGH discussion of nineteen separate topics under the classification of Criminal Courts and Procedure is contained in a recent report prepared for the American Bar Association by a committee on this subject of the New York County Lawyers Association, the largest local bar association in the country. The discussion, according to an introductory note, "covering a group of selected top-

ics is designed to furnish, in some measure, a guide to this mass of material—to give to the surveyor of the American scene in its criminal aspects some insight into the modern trend of this criticism and suggestion. The discussion, of course, cannot hope to be complete. The field is too broad, the problems far too numerous. The reports of a representative group of crime commissions, ranging from the Governor's Advisory Committee on Crime in Hawaii to the National Commission on Law Observance and Enforcement (the Wickersham Committee) and including the Model Code of Criminal Procedure promulgated by the American Law Institute, have, therefore, been examined and their recommendations reported, together with the reasons given. The existing practice is then considered, both in its historical and modern aspects. The discussion concludes with a presentation of the view of various legal writers and commentators, academic and professional.

"The Committee has submitted, in connection with each of the topics considered, its own recommendation with respect to the particular reform proposed. It desires to point out, however, that these recommendations, while based upon careful consideration of the available material, are, in view of the scope of the work undertaken and the need for haste in the submission of this Report, necessarily tentative.

"It is hoped that the Report will tend, in some measure, to stimulate interest in the necessity for procedural reform in our criminal law and will contribute to the movement for the enactment of legislation designed to improve and accelerate the administration of criminal justice. It requires no argument to establish that a substantial degree of improvement is imperative if the popular disfavor in which the criminal law is held is to be eliminated and the rights of peaceable citizens are to be given the protection which it is the primary function of government to secure."

This comprehensive work of 166 printed pages should be most valuable to committees studying ways and means of improvement of criminal courts and procedure. It is hoped that copies will be available for distribution on request either to the New York County Lawyers Association or to the American Bar Association. The committee which prepared the pamphlet is composed of Hon. Irving I. Goldsmith, chairman, Louis Fabricant, vice-chairman, Joseph A. McNamara, secretary, LeRoy Campbell, Abraham N. Davis, Rodney K. Frazee, Jonah J. Goldstein, S. Theodore Granik, Frederick L. Hackenburg, Harold W. Hastings, Victor House, Anna M. Kross, Robert E. Manely, Samuel Marcus, George Z. Medalie, Jacob Gould Schurman, Jr., Samuel J. Siegel, George Sylvester, Mary R. Towle, Albert Blogg Unger and Louis Waldman.

The Chairman gratefully acknowledges the work of Mr. George Sylvester whose assistance he states was largely responsible for the preparation of the report. The pamphlet is a striking evidence of the value of the National Bar Program as a result of which the research work of one association is made available to the entire bar.

Washington Letter

1266 National Press Building,
Washington, D. C., August 11, 1934.

The United States Supreme Court Room in the Capitol

ON May 28, 1934, Senate Resolution 193 was considered, amended and agreed to. It provides as follows:

"Resolved, That the court room now occupied by the United States Supreme Court in the Capitol, when vacated by the Court, and the space below it formerly a part of the court room, shall be preserved and kept open to the public under such rules and regulations as may be prescribed by the Architect of the Capitol with the approval of the Committee on Rules of the Senate."

This resolution was introduced February 19, 1934, by Senator Robinson, of Arkansas, and was referred to the Senate Committee on Rules. On May 11, 1934, Senator Copeland reported it with amendments.

On March 22, 1934, Senator Robinson asked to have printed in the Congressional Record a letter addressed to himself by Mr. Charles Warren, of Washington, D. C., together with certain excerpts from his publication entitled "The Supreme Court in United States History."

The correspondence and excerpts related to the room in the Capitol occupied by the Supreme Court of the United States. The letter reads as follows:

"Washington, D. C., March 13, 1934.

"My dear Senator: Mr. Frederic A. Delano has sent to me a copy of his letter to you of February 26, 1934, and of your reply to him of March 5, 1934, as to the old Supreme Court room. He has further asked if I would send to you direct any data that I may have as to the old room in which the Supreme Court sat.

"I am enclosing herewith pages 170-171 and pages 456-463 of my book The Supreme Court in United States History, volume I, which gives all the facts as to the early court rooms of which I am aware.

"(1) The Court originally sat from 1801-08 in the room which is now occupied by the marshal of the Court, to the south of the present court room. (I understand that some persons question this statement, but I believe that it is accurate.)

"(2) In 1808-09 the Court sat in the rooms now occupied by the clerk of the Court, while the Senate Chamber was being reconstructed.

"(3) In 1810-14 the Court sat in the room now occupied by the law library on the basement floor underneath the then Senate Chamber, that basement room having been formed when the then Senate room was floored over at the level of the first floor of the Capitol.

"(4) In 1815, after the destruction of the Capitol by the British, the Court sat at 204-206, Pennsylvania Avenue SE, in a house occupied by its clerk, Elias B. Caldwell.

"(5) In 1817-18 the Court sat in a small temporary room in the north wing of the restored Capitol.

"In 1819 the Court moved back into the room on the basement floor, in which is the present law library, and it remained in that room from 1819 to 1859-60, when it moved into its present quarters (the old Senate Chamber).

"It was in this basement room that the great cases of the Court were decided—the Dartmouth College Case, McCulloch v. Maryland, Cohens v. Virginia, Gibbons v. Ogden, the Cherokee Indian cases, the Dred Scott case, and many other famous historical cases; and in that basement room there appeared and argued all the great lawyers of the American bar prior to 1860.

"This room has not been changed structurally at all, and now, if the bookcases, etc., should be removed the room would appear just as it did in those 41 historical years from 1819 to 1860. If the law library is to be moved from its present location when the new Supreme Court Building is completed, it is to be hoped that the Senate will preserve this room structurally unchanged as a historical reminder of the Supreme Court room as it was from 1819 to 1860. If the resolution introduced by you is not sufficiently broad to cover this situation, Mr. Delano and I hope that it may be amended as to be applicable.

"I trust that the above gives you the

additional information which you desire.

"Very sincerely yours,
"CHARLES WARREN.

"Hon. Joseph T. Robinson,
"United States Senate, Washington, D. C."

The Supreme Court room in the Capitol was once the Senate Chamber. The Senate removed from this room on January 4, 1859, to the present Senate Chamber and on the occasion of that removal the then Vice President, Honorable John C. Breckinridge, was charged with the duty of expressing "some of the reflections that naturally occur in taking final leave of a Chamber which has so long been occupied by the Senate."

After discussing at length the various places at which Congress had assembled, the struggles which preceded the permanent location of the seat of Government, the circumstances under which it was finally established on the banks of the Potomac, and the burning of the Capitol in 1814, he pointed out that "On the 6th of December, 1819, the Senate assembled for the first time in this Chamber, which has been the theater of their deliberations for more than thirty-nine years."

As to the functions of the Senate at the origin of the Government, Mr. Breckinridge stated:

"At the origin of the Government, the Senate seemed to be regarded chiefly as an executive council. The President often visited the Chamber and conferred personally with this body; most of its business was transacted with closed doors, and it took comparatively little part in the legislative debates. The rising and vigorous intellects of the country sought the arena of the House of Representatives as the appropriate theater for the display of their powers. Mr. Madison observed, on some occasion, that being a young man, and desiring to increase his reputation, he could not afford to enter the Senate; and it will be remembered that so late as 1812 the great debates which preceded the war and aroused the country to the assertion of its rights, took place in the other branch of Congress. To such an extent was the idea of seclusion carried, that, when this Chamber was completed, no seats were prepared for the accommodation of the public; and it was not until many years afterwards that the semi-circular gallery was erected which admits the people to be witnesses of your proceedings. But now, the Senate, besides its peculiar relations to the executive department of the Government, assumes its full share of duty as a coequal branch of the Legislature; indeed, from the limited number of its members, and for other obvious reasons, the most important questions, especially of foreign policy, are apt to pass first under discussion in this body, and to be a member of it is justly regarded as one of the highest honors which can be conferred on an American statesman."

Vice President Breckinridge, in stating that the Chamber then occupied by the Senate must remain forever connected with great events and sacred to the memories of the departed orators and statesmen who there engaged in high debates and shaped the policy of their country, mentioned such names as Calhoun, Webster and Henry Clay.

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THE BAR'S OPINION ON JUDICIAL SELECTION

Answers to Association's Questionnaire on Judicial Selection Bring out Significant Facts —In States Where Judges Are Appointed by Governor or Chosen by Legislature Profession Is Strongly Opposed to Change—In "Elective" States Lawyers Are Dissatisfied with System and Want Something Else—Some New and Original Plans for Choosing Judges—Duty of Bar Association under Present Method of Selection—Majority Favors No Present Change in Tenure of Judges—Considerable Sentiment Favors Increasing Salaries of Trial and Supreme Court Judges—Bar Primaries, Judicial Personnel, etc.

LAWYERS in states where the judges are appointed by the governor or chosen by the legislature are strongly opposed to any change in the existing system, while the profession in those jurisdictions where the judges are elected is unsatisfied with present methods and wants something else. This very significant fact in reference to the selection of judges is brought out by the questionnaires received by the American Bar Association on that subject from bar association committees in thirty-five states. One hundred and twenty-eight questionnaires have been received, 14 of which are from state bar associations, 21 of which are from cities of 75,000 or over, and the remainder from smaller, local associations.

Although this subject is one in which the bar is almost universally interested, and although there is a fairly general dissatisfaction with the present methods of judicial selection in many states, nevertheless it appears that very little has been done towards adopting improved methods and only a few associations have regular or standing committees which are expressly designed to explore methods of choosing judges. A considerably larger number have sought to make the influence of the bar felt in this field through bar primaries. Probably this is largely accounted for by the fact that any change in method almost always requires an amendment to the state constitution, concerning the difficulties of effecting which lawyers are under no delusion. This questionnaire has created a great deal of interest, as is shown by the fact that twenty-five associations have taken a vote on the method which they recommend for selecting their judicial officers.

The wide difference of attitude on the part of the bar toward existing methods of judicial selection in those states where the judges are appointed by the governor or chosen by the legislature from that of the lawyers in the elective states is highly important, because here for the first time it is strikingly shown that the bar is satisfied in states where the choice is made by the governor or the legislature and is dissatisfied in the large majority of states where judges are elected by the people. While this may have been suspected before now, for the first time we have an authoritative opinion on it from the group which is most competent to render judgment.

In the states of Rhode Island, South Carolina, Vermont, Virginia, Connecticut, Delaware, Florida (as to trial court judges), Maine, Massachusetts, New Hampshire and New Jersey the judiciary is chosen by the legislature (in the first four listed) or the governor.

In reply to the first question: "Do you favor a change from present methods prescribed by your state constitution for selecting your judiciary?" the majority of the committees replying in 8 of these 11 states replied that they would not favor a change. In Florida, one committee favored election in counties under 100 000 and appointment in counties having a greater population, while a second committee, although favoring appointment, recommended nomination by judicial council and confirmation by the state senate. The other 2 states from the appointive list have not been heard from.

Although this only represents the judgment of 20 committees, they are from the most active bar associations in the appointive states, and it is not a mere coincidence that their verdict is so unanimous. Only 1 committee out of 20 reporting from these 9 states advocates election of judges by the people, while 1 other, as stated above, recommends election in the rural districts and appointment in the larger cities.

If we compare this with the returns from the elective jurisdictions, we find a very sharp contrast. Out of 105 committees reporting, 60 are in favor of a change in present methods as opposed to 45 which do not favor a change. The majority of committees in 13 of these states prefer some other system than election, as against the majority in 7 states which are in favor of retaining their present system. Twenty-three bar associations in the elective jurisdictions voted on the question, and 17 voted for a change as against 6 which were against a change in the selection of trial court judges, while 16 favored a change of method as applied to judges of the court of last resort, as against 7 which were opposed to change. Thirteen committees voted 10 to 3 for a change in the manner of picking intermediate appellate court judges.

The next question asked that one method out of four suggested be selected as that preferred by the association. The results were as follows:

	As to trial judges	As to judges of courts of last resort	As to judges of appellate court
A. Appointment:			
Committees—Appointive States	16	16	6
Elective States	33	37	21
Total	49	53	27

B. Election:			
Committees—Appointive States	2	1	0
Elective States ..	51	48	19
Total	53	49	19
C. Appointments, with subsequent check by the electorate after the appointee has served a certain period, as in the California or Cleveland Plans:			
Committees—Appointive States	0	0	0
Elective States ..	14	13	9
Total	14	13	9
D. Election of trial judges in small communities and appointment in large cities:			
Committees—Appointive States	1		
Elective States ..	5		
Total	6		
Votes by bar associations (included in previous table)			
A. Appointment:			
Committees—Appointive States	2	2	0
Elective States ..	13	11	9
Total	15	13	9
B. Election:			
Committees—Appointive States	0	0	0
Elective States ..	9	10	2
C. Appointment, with subsequent check by the electorate after the appointee has served a certain period, as in the California or Cleveland Plans:			
Committees—Appointive States	0	0	0
Elective States ..	2	2	2
D. Election of trial judges in small communities and appointment in large cities:			
Committees—Appointive States	0		
Elective States ..	2		

The bar is not lacking in new and original ideas on methods of electing the judiciary. Their plans are generally some modification of one of the four methods referred to in the questionnaire. There is a general feeling that lawyers should have some part in the nomination of candidates, whether the appointive or elective system is used. The suggestion is sometimes made that this shall be by vote of the bar association; sometimes by vote of all lawyers. One committee suggests that no judge shall be eligible to succeed himself, while another, which prefers appointment, would make reappointment by the governor mandatory if the bar approves. An original proposal is one from Pennsylvania for a self-perpetuating appellate court. An Illinois committee suggests that appellate court judges be appointed by the supreme court.

A suggested modification of the California plan would require that any judge subsequent to his appointment be required to go before the people at an election upon the question of whether or not he shall be retained in office, at any time, upon an order being made therefor by a specified nominating body or upon a petition by a certain percentage of the electorate.

Where the plan of one method of selection of trial judges for large cities and another method for the rest of the state is advocated, the following dividing line on the basis of population is suggested:

California (3 committees), 50,000, 200,000, 250,000; Florida, 100,000; Illinois, (2 committees), 250,000, 500,000; Michigan, 500,000; Oklahoma, 50,000.

The obstacle usually mentioned is that of an amendment to the constitution. Although this is admittedly very difficult, it is not considered insurmountable. Education of the people, political consideration and the difficulty in getting action from the legislature all come in for comment.

Duty of Bar Association Under Present Method of Selection

By a vote of over 4 to 1 the bar acknowledges its duty to decide which candidates for judicial office are best qualified and to work for the election where an elective system now exists. An even smaller number of associations do not believe, where the appointive system exists or in case of interim appointments to fill vacancies, that the bar association should decide which candidates are best qualified and attempt to secure their appointment.

Tenure and Salaries

The majority opinion of the bar favors no change in present tenure for either trial judges, supreme court judges, or appellate court judges. Seventy-five committees voted no change as to terms of trial judges, while 43 were in favor of lengthening present terms. Seventy-seven committees voted against change in terms of judges of courts of last resort against 37 which favored lengthening the terms, and 3 which favored shortening them. As to appellate court judges, the vote was even more decisive: 37 committees voted against any change; 14 favoring longer terms, 2 favoring shorter terms.

In spite of present economic conditions, a considerable sentiment, though less than a majority, favors increasing the salaries of trial court judges and supreme court judges. Fifty-eight committees voted for no change in present salaries of trial judges, while 50 voted for an increase, and 5 suggested a decrease. As to judges of courts of last resort, 65 voted against an increase to 44 in favor of such action and 4 for a decrease. The sentiment as to intermediate appellate court judges is much stronger that they are being adequately compensated at this time, 34 taking this view to 10 favoring an increase and 5 favoring a decrease.

The difficulty of drawing correct conclusions from questionnaire returns is sharply indicated in reference to tenure and salaries. Fifteen of the 128 questionnaires are from Pennsylvania, which has terms of 10, 21 and 10 years respectively for its trial, supreme court and appellate judges, and pays salaries of from $9,000 to $15,000 to its trial judges, $19,500 to supreme court judges and $18,000 to appellate court judges. Only two of these 15 committees want an increase in the terms or salaries of trial judges. One of the committees only favors increasing the term of supreme court judges and none favor increasing the salaries; while 6 committees favor an increase in the term of the appellate court judges, and none favor an increase in salaries. If these 15 committees are not considered in the tabulation, the results are as follows:

Tenure and Salaries (Without Pennsylvania Committees)

	Trial Court Judges	Judges of Courts of Last Resort	Appellate Court Judges
TENURE			
Increase	41	36	8
No change	62	64	28
Decrease		2	2
SALARIES			
Increase	48	44	10
No change	58	55	25
Decrease	3	1	3

Twelve associations favored life terms for the supreme court, although many of the suggestions for a longer tenure for those judges proposed 10 or 12 year terms. No decreases in salaries were proposed by associations in cities of 75,000 or over, and their vote was about even as to whether the salaries should be increased or should remain where they now are.

Appointment, Nomination and Confirmation

Where appointment was favored, the governor was almost universally recommended as the appointing agent, although a state committee of lawyers, the supreme court, the court of appeals, the chief justice and the general assembly were each recommended. Seven committees favored appointment by the governor with neither nomination nor confirmation by any other body. Twenty-two committees favored appointment by the governor after nomination by an independent body but with no confirmation required. Twenty-three committees favored appointment followed by confirmation by some independent body but rejected the proposal of nomination by an independent body. Sixteen committees favored both nomination before appointment and confirmation after appointment by independent bodies. By far the most popular plan for nomination was the proposal that either the bar association or the bar should nominate a certain number of candidates to be submitted to the governor for his choice. Four associations proposed that these nominations should be made by the supreme court, several advocated the method used in the California plan and several others a commission similar to that proposed in the Cleveland plan. The senate was generally named as the appropriate body to confirm the governor's selection. Six votes were cast for a Governor's Council to perform this function, four for the Judicial Council to confirm, two for the legislature as a whole and one committee favored the supreme court and one the bar association as the confirming agency.

In the case of appointment by the governor to fill a vacancy, 10 committees favored neither nomination nor confirmation by independent bodies, 28 favored nomination but not confirmation, 16 favored confirmation but not nomination, and 19 favored both nomination and confirmation.

Non-Partisan Election

Fifty-five associations favored a separate non-partisan ballot for judges following a primary, as against 34 which were opposed to it. Three favored the non-partisan ballot without the primary. In Iowa, where the non-partisan law covering the election of judges was in effect from 1913 to 1919, 3 committees voted against it. In Pennsylvania, where it existed up to 1921, 7 committees voted against it and 6 for it. In Oregon and Nevada, where it is now in use, 2 committees in each state voted in favor of it, while in Ohio the vote was 2 to 2, the objection being to the primary feature. Seventeen committees or associations have made recommendations in reference to judicial selection but usually nothing more has been done about it, except in some cases where a bar primary has been adopted and in others where the legislature has defeated proposed changes. Some alterations have been made in statutes or constitutions regarding the selection of judges in 7 states within the last 10 years.

Bar Primaries

Bar primaries are reported as having been held in the past by the following bar associations: Cincinnati, Cleveland, Colorado State Bar, Des Moines, Los Angeles, Louisiana State Bar, Milwaukee, Minneapolis, 11th Judicial District of Minnesota, Oakland (Alameda County), Omaha, Rhode Island State Bar, Tulsa, and small associations in California, Indiana, Oregon, Virginia and West Virginia. In a considerably larger number of cases there has been recommendation by the association to the governor as to appointments to fill vacancies, which recommendations may have been determined in open meeting, by committee or, less often, by a ballot. Results have varied from that of the association which secured the election of 8 out of 9 men recommended by the bar primary to that of the bar group which succeeded in only electing one candidate out of 5 recommended. In general, however, where primaries have been held, the results according to the questionnaires have been good. It is realized that it is impossible to state in specific instances how much a recommendation of the bar contributed to the results as contrasted with other circumstances.

Present Judicial Personnel

The opinion of the bar averages about the same as to the three classes of judges referred to in the questionnaire. The trial court judges have a bare shade the best of it and the supreme and appellate court judges have practically the same rating. The question to be answered read: "Does your committee regard as excellent, satisfactory, fair, or unsatisfactory, your trial court judges, the judges of your court of last resort, the judges of your intermediate appellate court?" The rating given all three classes is "satisfactory." The ratings are as follows:

	Excellent	Satisfactory	Fair	Unsatisfatcory
Trial Court Judges...	29	50	28	4
Judges of Courts of Last Resort	24	58	28	2
Judges of Intermediate Appellate Courts....	11	25	16	0

In putting this question in, it was thought that there might be some possibility of correlating the opinion of the bar in regard to its judges with its expressed preference in reference to retaining the existing system of selection of judges or changing it. It is true that in 10 cases out of 14, where the judges were regarded as "excellent" the committee was opposed to any change in method of selection. However, the terms "satisfactory" and "fair" are so loose that their relation to the desire of the bar for change is not definitely ascertainable. The opinion of the different committees or different members of the bar about the same judges differs widely. For example, to take the opinion of 13 Pennsylvania committees in reference to the judges of the supreme court of that state, we find 5 ranking them as "excellent," 4 ranking them as "satisfactory" and 4 ranking them as "fair." The average result of course is that the court would be statistically rated as "satisfactory."

A factor to be reckoned with, which has not been taken into account in this questionnaire, is the tendency in some states which almost amounts to

a tradition to re-elect the incumbent, unless he has proved to be wholly unsatisfactory. The following is a quotation from the questionnaire of the Dane County Bar Association of Madison, Wisconsin:

"Although the constitution and statutes provide for the election of the Judges of the Wisconsin Supreme Court, the Court of last resort, in actual practice the Judges acquire their offices by appointment. Several factors combine to bring about this result.

"There are seven Supreme Court Justices who hold office for the term of ten years, but in case of vacancy the Governor appoints a successor who holds office until the vacancy can be filled by election in some year when no other Justice is elected. Since there are seven justices, each elected for a term of ten years, there are only three years in each ten when an election may be held to fill a vacancy. Consequently, a Justice appointed to fill a vacancy frequently holds office two, three or four years before an election can be held to fill the vacancy. In view of the fact that there is a highly developed public sentiment in favor of reelection of sitting judges, the result is that a Judge appointed to fill a vacancy almost invariably is reelected when it becomes necessary for an election to be held to fill the vacancy.

"Furthermore, judicial elections are held in April and not at the time of holding the general election, and a separate ballot is provided on which no party designation is permitted. The result is that judicial elections are almost entirely free from party politics, which situation is furthered by the fact that candidates for judicial office are nominated by the filing of nomination papers and not by party primaries, caucuses or conventions.

"The result of this combination of laws and circumstances may be seen in the fact that only one of the present seven Justices of the Supreme Court holds office by virtue of an original election, all the other six having been originally appointed by the Governor to fill vacancies.

"As to the Judges of the Circuit Courts, the trial Courts of record, some of the same factors apply, as many of the Circuit Judges originally took office by appointment to fill vacancies. While they hold office under such appointments only until a successor is elected at the succeeding April election, the sentiment in favor of continuing sitting Judges in office, together with the fact that the nominations are made by nomination papers and not by party action and the fact that the elections are held in the spring so that there is little or no party politics connected therewith, has resulted in the continuance in office of a very large number of the Circuit Judges who were originally appointed by the Governor to fill vacancies.

"In view of the foregoing, it is apparent that, although the offices of Supreme and Circuit Judges are nominally elective, in practice the offices are very largely appointive."

Outside of the 25 associations which voted on the questionnaire, the answers are generally the product of a committee of three men. They represent the considered opinion of a small group which has given thought to the subject and as such are exceedingly interesting. But from a scientific standpoint at least they cannot be considered as the opinion of the bar as a whole and therefore some degree of caution must be used in reaching conclusions on the basis of the answers received.

WILL SHAFROTH,
Assistant to the President.

A Handbook on the Selection of Judges is in preparation by Professor Evan Haynes of the University of California School of Jurisprudence and will be ready for distribution some time this fall.

CRIMINAL LAW ENFORCEMENT IN OUR CITIES

Since Bar of Country Communities Reports That Enforcement of Criminal Law Is Fairly Satisfactory, It Is Evident That Attention Must Be Concentrated on the Cities in Order to Find out Present Situation and to Plan Intelligent Attack—Tabulation of Answers from Fifty-four Important City Associations Here Presented—Lawyers Who Give Unethical Assistance to Criminals, Racketeering and Kidnapping Are Almost Exclusively Metropolitan Problems—Bar in Cities More Aroused as to Profession's Responsibility for Enforcing Criminal Laws, etc.

AGENCIES charged with the administration of the criminal law in our metropolitan centers are more efficient than those in rural districts, but their net result is not as satisfactory because their problems are vastly more complicated, according to the questionnaires returned by 54 bar associations in cities of one hundred thousand or more population. For example, Chicago, Minneapolis, and New York are known to contain the hide-outs of many gangsters and criminals whose very presence increases the law enforcement difficulties of those cities. Even if their police, prosecutors and judiciary were as efficient as could be wished, their inhabitants could not expect to enjoy the freedom from crime which is found in rural districts or small cities. It must therefore be realized that the problem of the effective handling of lawlessness is different in city and country and different standards must be applied.

From the bar of the country communities, we have the answer that the enforcement of criminal law is not a matter of particular concern to them as the present situation is at least fairly satisfactory and in many places entirely so. It is then evident that our efforts must be concentrated on the cities if we are to find where the rub comes, and what the present situation is, and this must be known before an intelligent attack can be planned.

For these reasons, the study of the questionnaires from the larger cities is important. The tabulation of the answers from 54 city associations shows a few points of marked difference from the replies received from the entire group of bar associations answering the questionnaire, which in-

cludes practically all of the two hundred strongest associations in the country. For instance, three-fourths of the metropolitan bar associations allege that some relationship exists between politics and crime, while two-thirds of the rural associations deny it.

The country districts have little complaint of their prosecutor except that he sometimes does not have sufficient or well enough qualified help and is lacking in facilities for conducting investigations. While the city associations are less satisfied with this official and the conduct of his office, it cannot be said that they regard this as a weak point since four out of five of them assert that the office is functioning adequately. Political considerations play a larger part in the appointment of the prosecutor's staff in the city than in the country, but this has not resulted in incompetent personnel.

The police in the city are reported as being more efficient than those in the country, as would be expected, although more subject to political control and corruption. There is much less security of tenure among rural enforcement officers and the pay is not as generally regarded as sufficient. Of course, their instruction and their use of methods of scientific crime detection are far behind the standards of the city police.

The problem of lawyers who give unethical assistance to criminals, racketeering, kidnaping, and the extension of federal authority over local administration of criminal justice are almost entirely metropolitan problems. State bar associations have been more active than any others in studying and recommending improvements in criminal procedure and the bar, both rural and urban, regards this as the most important of the subjects mentioned in the criminal law questionnaire from the lawyer's standpoint.

The members of the profession in our larger centers of population are more concerned with arousing the bar to its responsibilities in reference to criminal law than are their country cousins, and they believe this can be done where needed by active bar association leadership.

The answers sent in by 54 bar associations scattered over the country have been roughly tabulated as follows:

1. Relation Between Politics and Crime

a. In your community, to what extent, and in what types of violations of the law, if any, do criminal offenders have sufficient influence to prevent their arrest and punishment?

None, 13; In minor offenses, 37; Very little, 2; No information, 1; No answer, 1.

b. Is this influence generally exercised through the police, prosecutor's office, or court?

Through the police, 24; To some extent through all of the enumerated sources, 15; None, 15.

c. Are district leaders or other politicians financially interested in any criminal enterprises?

No, 33; To some extent, 12; Rare, 2; No evidence, 7.

d. To what extent have criminal elements been identified with election frauds, i. e., have gangsters or other notorious criminals been used in connection with election frauds?

None, 42; Rare, 3; To some extent, 6; Considerable, 3.

e. Have any of the situations referred to in a, b, c, or d above been the subject of special study in your community?

No studies, 36; casual studies, 10; Significant studies, 8.

f. What if any remedies have been proposed to meet any of the above situations?

No suggestions, 32; Associations indicating remedies proposed, 22.

2. Prosecutor

a. Is the prosecutor's office in your community functioning satisfactorily in conducting investigations of either the commission of specific crimes or of the conduct of public officers?

Yes, 42; Faulty in conduct of investigations, 6; Not in cases of public officers, 1; No, 5.

b. Is the prosecutor's office in your community efficient in the conduct of criminal trials?

Yes, 49; No, 5.

c. If not, what reasons would you give for inefficiency as to either of above duties?

Politics, 13; Youth and inexperience, 2; Situation satisfactory, 19; No answer, 20.

d. Is the staff adequate?

Yes, 42; Not for investigations, 6; No, 6.

e. Does the personnel consist of trained, experienced, or otherwise competent assistants?

Yes, 38; Not for investigations, 6; No, 10.

f. Does the office cooperate adequately with the police and other enforcing agencies?

Yes, 44; No. 10.

g. Is the policy of bargaining with offender for plea of guilty of lesser offense abused?

Yes, 1; To some extent, 4; No, 49.

h. Are forfeited bail bonds actually collected?

Yes, 35; Few forfeitures, 4; Surety companies insolvent, 2; No, 13.

i. Are the assistant district attorneys or other subordinate officers in the prosecutor's office primarily political appointees?

Yes, 27; Yes, but results are satisfactory, 16; No, 11.

j. Do you attribute any of the defects or inefficiency to the fact, if such is the fact, that the appointments are based essentially on political considerations rather than upon legal or other professional ability?

Yes, 5; Situation satisfactory, 37; No answer, 12.

k. Enumerate any other major defects in prosecutor's office.

Situation satisfactory, 30; Joinder of Criminal and Civil Functions, 1; Answers not responsive, 8; No answer, 15.

3. Police

a. In the performance of their functions of crime prevention, detection and arrest of criminals would you grade the police and other enforcing agencies in your community as excellent, good, fair, or poor?

Excellent, 8; Good, 35; Fair, 8; Poor, 2; No answer, 1.

b. Are they subject to political control?

No, 20; Under Civil Service, 6; To some extent, 11; Yes, 16; No answer, 1.

c. To what extent, if any, are they subject to corruption, financially or otherwise?

None, 19; Very little, 4; To some extent, 12; Much, 11; No evidence, 7; No answer, 1.

d. Is the method of selection used calculated to secure desirable personnel?

Yes, 32; No, 6; Under Civil Service, 15; Don't know, 1.

e. Have they security of tenure?

Yes, 40; No, 6; Civil Service, 7; No answer, 1.

f. Do they receive adequate compensation?

Yes, 37; Reasonable, 3; Fair, 2; No, 12.

g. What provision exists for police instruction?

None, 8; Casual, 22; Adequate, 24.

h. If inefficiency in police or other enforcing agencies exists, what reasons would you give for it other than those included in the above subdivisions of this topic?

Inadequate training, 13; Politics, 9; Situation satisfactory, 13; None, 11; No answer, 8.

i. Do they use modern methods of scientific crime detection, including fingerprint and photographic records?

Yes, 49; No, 5.

j. Is the system of fingerprints and photographs of defendants centralized in any state office of records and identifications?

Yes in 27 states.

k. Are fingerprint and photographic records and other criminal information regularly forwarded to the Bureau of Criminal Records and Identification of the United States Bureau of Investigation at Washington, D. C.?

Yes, 48; No, 3; No answer, 2; Don't know, 1.

4. Lawyer Criminal

a. Are there lawyers in your community who give unethical assistance to criminals either before or after the commission of crime?

No, 20; Very few, 20; Some, 8; No evidence, 6.

b. What steps if any are being taken to check this type of activity?

Disciplinary proceedings, 20; Criminal prosecution, 2; Situation satisfactory, 28; Nothing, 4.

c. To what extent have the members of the bar who specialize in criminal cases organized bar associations of such specialized practitioners?

None, 51; Some, 2; No answer, 1.

d. Is the practice of criminal law in your community confined to a comparatively small group of lawyers specializing in such cases?

Yes, 41; None, 13.

5. Racketeering

a. To what extent if any is the legitimate business of your community under the influence of racketeering?

None, 44; To some extent, 10.

b. Does any racketeering exist in your community in connection with employer-labor relations, i.e., in labor unions, protective associations, etc.?

None, 42; To some extent, 10; No evidence, 2.

c. Has the prosecutor's office in your community successfully dealt with racketeering either by means of appropriate investigation or prosecutive action?

Yes, 7; No, 3; No problem, 39; No answer, 3.

d. Has the United States Attorney for your district been more effective in combating racketeering than the local prosecutor?

No, 10; No problem, 37; No answer, 7.

6. Kidnaping

a. How many instances of kidnaping have occurred in your community since January 1, 1933?

None, 40; Trouble reported, 14.

b. In how many cases have the principals in the kidnaping been apprehended?

All, 11; 7 out of 21, 1; No problem, 37; No answer, 5.

c. In how many convicted?

All, 12; 6 out of 22, 2 out of 21, 2; No problem, 35; No answer, 5.

d. How many instances of attempted kidnaping or threats to kidnap persons unless payment was made (extortion) have occurred in your community since January 1, 1933?

None, 43; Five, Twenty-Six, Hard to say, Two, Two, Two, One, Several, Several, 9; No answer, 2.

e. In how many of such cases has the local prosecutor taken effective action?

In all cases, 12; No problem, 37; No answer, 5.

7. Criminal Procedure

a. What parts of the Model Code of Criminal Procedure of the American Law Institute have been adopted in your state since 1930?

Portions adopted in 15 states.

b. Is there a committee of lawyers in your community or state studying the reform of criminal procedure?

Yes, 27; Only in State Bar, 14; No, 13.

8. Federal v. Local Administration of Criminal Justice

a. Has the United States Attorney for your district confined himself strictly to cases involving federal jurisdiction or has he extended federal criminal jurisdiction to include cases essentially local in character, i.e., where all of the material witnesses reside in the state, where all of the material evidence is in the state, where the crime violates a specific provision of the state criminal code?

Wholly confined to federal jurisdiction, 40; Federal prosecutor in liquor cases, 14.

b. If such extension of federal jurisdiction has taken place, has federal action been more effective than local action in essentialiy similar cases?

Yes in liquor cases, 8; No extension of jurisdiction, 40; No, 6.

c. Has your state adopted the uniform statute dealing with the interstate rendition of witnesses in criminal cases, or is your state considering the adoption of such uniform statute?

Yes in 6 states.

d. Are there proposals pending in your state, dealing with reciprocal interstate legislation for the purpose of overcoming the obstacles of territorial jurisdiction in the administration of criminal law?

Yes in one state.

e. Are there any proposals pending in your state dealing with interstate compacts, with Con-

(*Continued on page* 549)

TREND OF UNITED STATES SUPREME COURT DECISIONS AFFECTING RATES OF PUBLIC UTILITIES*

By John L. Collins
Member of the Hartford, Conn., Bar

RECENT decisions of our United States Supreme Court respecting rates of public utilities, read in the light of decisions of about the last decade, reveal the law is undergoing a rapid change. This change manifests itself essentially in a restoration of wide Commission discretion in determining reasonable rates and a practice of looking through the form of the Commission's order to the substance and sustaining it, if an examination and the weighing of the entire order shows no substantial injustice has been done to the utility company, although specific parts of the rate problem either may have been overlooked or not given the specific attention they were entitled to. I say a restoration of wide Commission discretion because the frequent conflict between Court and Commissions in the last decade as to the proper concept of value and a fair rate of return in an era of rapidly rising prices often led the Court, in the exercise of its power to interpret the Federal Constitution, to closely restrict the exercise of the legislative function, as appears from some of the cases referred to below. Now, the legislative branch is restored to rank equal with the judicial and the Court is not prone to interfere with the Commission's decision unless a clear case of confiscation is made out.

The principal decisions of the Supreme Court from the war period up to the economic depression made clear that the record must disclose that cost to reproduce at current prices had been given weight by the Commission in determining fair value, otherwise the order would be adjudged confiscatory.[1] This determination to see that fair value gave recognition to current prices of labor and material went so far as to cause the Court, in sending the case back, to indicate in at least two cases the minimum fair value that must be reached, in the one case about half way between original cost and reproduction cost, and in the other case at about reproduction cost upon the Commission's estimate.[2]

To get the proper perspective of these decisions, one needs only to look at a graph showing the generally upward trend in price levels from 1915 to 1930 and consider the majority opinion of the Court that the concept of value for rate making should be measured in part by changes in the price levels of labor and material constituting the property of the utility. The desire of Commissions generally to adhere to original cost as a stable rate base in an era of rising price levels, the extent of which could not be foreseen, and the practice of companies in this profit era of advocating reproduction cost as equivalent to value, now that the tables were turned in favor of the companies, were the principal factors creating the conflict decided in favor of cost of reproduction.

In the Los Angeles Gas and Electric Corporation case[3], decided in May 1933, upon an order of the California Commission made in November, 1930, we see cost of reproduction thrust into the background and original cost brought into the foreground. In this case the Commission used two rate bases, one of historical cost in amount of $60,704,000 and the other fair value in amount of $65,500,000, both without deduction for accrued depreciation, upon which the Commission prescribed rates designed to yield 7.7% and 7% returns respectively. The historical cost originated in a finding of fair value made in 1917 and accepted by the Company, to which had been added net additions at cost each year up to the time of the order and by far the greater part of that total cost was represented by additions from January 1, 1922. The cost to reproduce appraisals in evidence before the Commission were held entitled to no weight as predictions at the time of future prices since they failed to reflect the changed economic and price levels from 1930 on. The fact that they can be made conjectural is commented upon, apparently the first doubt of their reliability since the war period. The additions to the Company's property from 1926 on, as recent constructions, were good evidence of their value in November, 1930, and since the bulk of the property was added from 1922 to 1929, they were constructed at price levels higher than in 1930 on, to which period related the rates prescribed. For these reasons historical cost was held entitled to great weight in determining fair value.

We see the same broadening of historical cost as a rate base in Clark's Ferry Bridge Company v. Public Service Commission of Pennsylvania[4] decided in 1934 upon a simpler state of facts and we see in Dayton Power & Light Company v. Public Utilities Commission of Ohio,[5] decided about the same time, the conjectural nature of reproduction cost discredited by analogy where book cost of leasehold interests in gas producing lands was ap-

*Address delivered on June 25, 1934, as Attorney for the Connecticut Public Utilities Commission before a meeting of the New England Association of Public Utility Commissioners at Hartford.

1. State of Missouri ex rel. Southwestern Bell Telephone Co. v. Public Service Comm. of Missouri (1923) 262 U. S. 276, 287 and cases cited therein.; Bluefield Water Works and Improvement Co. v. Public Service Comm. of West Virginia (1923) 262 U. S. 679, 689; McCardle v. Indianapolis Water Co. (1926) 272 U. S. 400, 408; St. Louis & O'Fallon Railway Co. v. United States (1929) 279 U. S. 461, 484.

2. State of Missouri ex rel. Southwestern Bell Telephone Co. supra p. 288 $25,000,000 fair value was indicated as against adjusted original cost less accrued depreciation of $20,456,621, reproduction cost less accrued depreciation of $31,355,675 and Commission's fair value of $20,400,000. McCardle v. Indianapolis Water Co. supra p. 421, $19,000,000 minimum fair value indicated as against Commission's fair value of $15,260,000 and $19,500,000 Commission's reproduction cost estimate.

3. 53 Supreme Court Reporter 637.
4. 54 Supreme Court Reporter 427.
5. 54 Supreme Court Reporter 647, 652f.

proved as the rate base in view of the widely divergent estimates of fair market value.

The concept of value as measured in part by changes in labor and material prices still remains in rate-making and prudent investment cost is not yet the rate base. The metamorphosis, however, appears in process and it seems safe to say that the rules respecting determination of fair value have been made sufficiently elastic to sustain a Commission in substantially adopting historical cost as the rate base under present day price levels where the property was constructed from 1926 on, or where the bulk of the property represents construction during the war and post-war periods. Even in a period of rising prices, actual construction costs of the company near the time in question can be utilized to determine whether the reproduction cost estimate is conjectural and therefore entitled to little or no consideration.

The Los Angeles Gas and Electric Corporation case is also authority for a Commission to exclude from the reproduction cost appraisal, and probably also from the historical cost, plant and equipment having a standby purpose only and Columbus Gas and Fuel Company vs. Public Utilities Commission of Ohio, decided in 1934,[6] is authority for excluding from both reproduction cost and historical cost property held in reserve for future use, unless the occasion for its use is close to the time of the rate determination.

Going Concern Value

The intangible and subtle nature of going concern value, its shadowy distinction from good will, and its recoupment by the company in the form of a charge to operating expenses, if it actually exists, all of which and other of its difficulties have troubled Commissions in the past, will probably trouble them less in the future as the element appears to be on its way out of the rate base. Georgia Railway and Power Company v. R. R. Commission of Georgia[7] and McCardle v. Indianapolis Water Company[8] and the other cases referred to in the latter, made clear that the record must disclose a specific allowance for going concern value generally at about 10% of the rate base. The Los Angeles Gas & Electric Corporation case[9] is the first important decision in the evolution of this element, since it finds the requirement of going concern value satisfied if the record discloses a rate base determined on the basis of an integrated, operating enterprise, although a specific allowance for going concern value does not appear, and since the decision states that the history and circumstances of the company involved, rather than a general principle, will determine how much, if any, allowance should be made.

The Dayton Power and Light Company[10] carries the evolution one step farther in expressing doubt that there is left an element of going value to be added to the total, after valuing the assets upon the basis of a plant in successful operation, and says that in any event, "the omission to make it does not appear to have been so unreasonable or arbitrary as to overleap discretion and reach the zone of confiscation." The Columbus Gas and Fuel Company case[11] further restricts going concern value by justifying a small or nominal allowance for a company engaged in distribution only, by holding that the determination of an allowance on the basis of "overcoming initial difficulties incident to operation and in securing patronage" may be negatived by evidence that the Company's service is in great demand, particularly where it has no competition, and by holding that cost of attaching new customers has already been reimbursed to the Company through charging the cost to operating expenses.

Going concern value, as the stepchild of good will, appears destined to the same fate, but it seems fair to state that a rate base established in the interim should include something for going concern value if reached substantially upon historical cost; but if established substantially upon reproduction cost, and reasonable allowances for overhead have been included, nothing need be added for going concern value.[12]

Cost of Financing

Cost of financing as an element to increase the rate base has proven conjectural like going concern value. It has raised its head again[13] in three recent cases[14] and has been dismissed as remote and conjectural in view of the absence of any evidence that such expense was incurred when the business was established and uncertainty that it would be incurred "if the plant were destroyed and reproduced."

Fair Return

Lincoln Gas and Electric Light Co. v. Lincoln[15] and the Bluefield Water Works and Improvement Company case[16] represented in the era of post-war price levels the upward swing in the rate of return from those decisions of the pre-war era in which 6% was regarded as a fair rate of return.[17] From then on until 1933 a 7½% and 8% return was generally held necessary to avoid confiscation.[18] Then in the Wabash Valley Electric Company case,[19] decided in January, 1933, we see the Court approving 7% as a fair return, the financial strength of the Company, and its ability to borrow money advantageously from its corporate affiliate justifying a decrease in the rate of return and the departure from the high level emphasized in United Railways and Electric Co. v. West explained by the distinction of a street railway business, with its loss of revenue from competition, requiring a higher rate of return than a utility enjoying a monopoly, although Public Service Commission of Montana et al v. Great Northern Utilities Company,[20] decided about the same time, makes clear that such an economic situation necessarily and lawfully results in a decrease in the rate of return. We see a 7% return again sustained in the Los Angeles Gas and Electric Corporation case,[21] based essentially upon the profitable financial history of the Company and the economic depression; the same rate sustained

6. 54 Supreme Court Reporter 768.
7. 262 U. S. 625, 632.
8. Supra p. 415.
9. Supra p. 647f.
10. Supra p. 656f.
11. Supra p. 769f.
12. See Des Moines Gas Co. v. Des Moines 238 U. S. 153, 171, which now appears to be good law again.
13. See Galveston Electric Co. v. City of Galveston, 258 U. S. 388, 397.
14. Wabash Valley Electric Co. v. Young (1933) 287 U. S. 488, 500; Los Angeles Gas and Electric Corp. supra p. 646; Dayton Power & Light Co. v. Public Utilities Commission of Ohio, supra, p. 657.
15. 250 U. S. 256, 267.
16. Supra p. 695.
17. Wilcox v. Consolidated Gas Co. 212 U. S. 19, 50; Cedar Rapids Gas Light Co. v. Cedar Rapids 223 U. S. 655, 670; Des Moines Gas Co. v. Des Moines, supra p. 172.
18. United Railways and Elec. Co. v. West 280 U. S. 234, 252 and cases cited therein.
19. Supra p. 502.
20. 289 U. S. (1933) 130, 135.
21. Supra p. 649.

in Clark's Ferry Bridge Company[22] and finally we see a 6½% return sustained as fair in Dayton Power and Light Company[23] upon the same principles.

This appears to be the lowest rate sustained in the post-war period and it seems reasonable to believe from these recent decisions that a 6% return will be sustained in the near future, for the same reasons justifying a reduction in this depression from 8% to 6½%, and if so, we will be back to the rate of return regarded as reasonable in the pre-war period.

Operating Expenses

In State of Missouri ex rel. Southwestern Bell Telephone Co.,[24] we saw the power of the Commission emphatically denied to question the reasonableness of a 4½% charge on the Company's operating revenues paid to the affiliated American Telephone and Telegraph Company as rent for receivers, etc., licenses and services, although this amount was a part of the operating expenses of the subsidiary company, the reasonableness of which expenses was being determined by the Commission. We now see the power of the Commission sustained, in determining reasonable operating expenses, to inquire into not only the reasonableness of a management fee paid by the operating company to the holding company,[25] but also to inquire into the reasonableness of the charge paid by the operating company to its corporate affiliate for the commodity distributed, even though the affiliate is not a party to the rate proceeding and even though the contract between the affiliates may require modification between themselves as a result of the Commission determining unreasonable the price paid by the operating company to its affiliate.[26]

The seemingly unfair and unsound rule stated in United Railways and Electric Co. v. West[27] that in fixing rates the Commission must determine the annual charge for depreciation on fair value, as measured apparently by replacement cost at the time of the rate investigation, instead of original cost, appears inferentially to have been overruled by Lindheimer et al v. Illinois Bell Telephone Co.,[28] where the annual charge of the company had been determined in the past on original cost and the straight line method in conformity with the accounting requirements of the Interstate Commerce Commission. Approval is inferentially given to determination of the annual charge on the basis of original cost and is adverted to by Justice Butler in a concurring opinion[29] as not being in harmony with the rule in United Railways and Electric Co. v. West.

The Lindheimer et al. v. Illinois Bell Telephone Co. case also makes clear that close scrutiny of the annual charge for depreciation will be sustained and that if the annual charge appears to have been excessive in the past, when examined in the light of the Company's reserve for depreciation, the accrued depreciation as found to exist, the amount of the plant and equipment account, the annual expenses charged to maintenance, and other relevant financial data, the Company's burden of proving unreasonable the rates prescribed by the Commission will be very great. This decision therefore appears to greatly modify the seemingly severe rule in Board of Public Utility Commissioners v. New York Telephone Company[30] holding that property represented by the credit balance in the reserve for depreciation cannot be used to support confiscatory rates—a modification much beyond the ameliorating advance of Smith et al v. Illinois Bell Telephone Company,[31] holding that excessive charges to depreciation in the past will justify imposing lower charges in the future.

We see the broadening of commission discretion generally, reflected in a recent decision[32] denying to the United States District Court, in the exercise of its equity powers, the right to attach a condition to its order enjoining the Commission's rates as unreasonable, which condition might have had the effect of depriving the Commission of its power to determine reasonable rates in a further hearing. We also see in another decision that the Commission is vested with power to prescribe minimum rates in order to prevent destructive competition between utilities competing within the same territory;[33] and in another decision sustaining the Commission in materially reducing rate case expense and in treating as a unit for rate making a municipality forming a part of a large interconnected distribution system,[34] subject, however, to the limitation that any required allocation of common property shall be reasonable.[35]

The practice of the Court in looking through the form of the Commission's order to the substance and sustaining the Commission, if an examination and weighing of the entire order shows no substantial injustice has been done to the Company, although specific parts of the rate problem may have been overlooked or not given the specific attention they were entitled to, is strikingly shown in the Los Angeles Gas and Electric Corporation case.[36] Here the Court resorted to computation of the errors in favor of and against the Company, the net result of which left an excess which the Court held could be assigned to going concern value and any other items omitted by the Commission. This weighing of the debits and credits and striking a balance is further shown in Dayton Power and Light Company[37] where one of the issues was whether leasehold interests held in reserve should also be included in the rate base. The evidence of market value of the leaseholds in use being entirely untrustworthy the Court held the actual cost should govern, the total of which for all leasehold interests in use and in reserve was less than the value placed by the Commission and State Court upon the leasehold interests in use alone. Hence, it was regarded as unimportant whether the Commission should include all of the leasehold interests in the rate base. The record in this case also disclosed that the Commission's allowance for amortization and depletion of leaseholds in use was generous, which generous

22. Supra p. 431.
23. Supra p. 657.
24. Supra p. 288-9.
25. Dayton Power & Light Co. supra p. 655.
26. Western Distributing Co. v. Public Service Commission of Kansas 285 U. S. 119; Dayton Power & Light Co. supra p. 650; Columbus Gas & Fuel Co. supra p. 765.
27. Supra p. 254.
28. 54 Supreme Court Reporter 658, 664 f.
29. Supra p. 669 (foot-note).
30. 271 U. S. 23, 30 f.
31. 282 U. S. 133.
32. Central Kentucky Natural Gas Co. v. R. R. Commission of Kentucky, 54 Supreme Court Reporter (1933) 154.
33. Public Service Comm. of Montana v. Great Northern Utilities Co., supra p. 126.
34. Wabash Valley Electric Co. v. Young, supra, p. 500 and 498.
35. Columbus Gas and Fuel Co. v. P. U. C. of Ohio, supra p. 768.
36. Supra p. 648.
37. Supra p. 652 f.

treatment was used by the Court to supply "a margin for the correction of other contested items that may approach the border line."

Both of these decisions appear eclipsed by Lindheimer et al. v. Illinois Bell Telephone Co.[38] where the record below relating to the Company's financial operations for the period 1923 to 1932 inclusive "if accepted would compel the conclusion that, when the Commission's order was made in 1923, not only the new rates, but the existing rates as well were confiscatory." The Court examines intensively the make-up of the balance sheet, the operating revenues and expenses during these years, particularly the excessive annual charge for depreciation in the past and upon the conclusion of excessive profits during those years brushes aside as at variance with the realities of the case the theoretical evidence supporting the record below and reverses the lower court which had held the Commission's rates confiscatory.

These decisions of our United States Supreme Court bear eloquent testimony that law is not static, but, on the contrary, is dynamic in its force and, as a true social science, arises to the occasion of the changed economic and social conditions of our country and moulds the law to conform to those changes.

What safeguards should we follow to maintain intact our restored legislative discretion? First, it seems to me, that in all matters relating essentially to the rate base, we must not be too general in reaching our conclusions, expecting the Court to look through the form to the substance of the whole subject matter in order to sustain the Commission. Second, while taking full account of excessive profits in the past, still establish a rate of return that will not deter capital from resuming its function when the time for further plant expansion comes again, remembering that adequacy of service is a cardinal principle of regulation and that it cannot be rendered without the utility keeping abreast of the developments in the arts, nor service extended to new fields without capital. Third, in determining operating expenses, we must bear in mind that prices for labor and material are already indirectly fixed in part through code operation, that prices are rising and that the tax burden on the industry is ever increasing. Fourth, in the entire field of regulation, while seeing that unjust enrichment does not take place, try to keep ourselves within our proper sphere and not invade the function of management nor oppress the industry so that private initiative, which has made our public utility industry as a whole outstanding in the world for quality of service and reasonableness of cost, shall not be stifled and advancement in the material comforts of life shall not be lost to the nation.

38. Supra p. 662.

RIGHTS OF EMPLOYERS AND EMPLOYEES IN INVENTIONS MADE BY THE LATTER

This Has Long Been a Vexed Question for All Parties Concerned, but It Seems to Have Been Settled to a Considerable Degree by Supreme Court's Decision in Standard Parts Co. vs. Peck—Consideration of Other Recent Decisions—Basic Question in All Such Cases Is Simply That of the Ordinary Contractual Relation of Master and Servant or Employer and Employee

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THE rights of employers *vis-a-vis* their employees in inventions made by the latter have long been a vexed question for all parties concerned; and judicial pronouncements on the subject are far from harmonious. The question seemed, however, to have been settled, to a considerable degree at least, by the Supreme Court's decision in *Standard Parts Co. vs. Peck*,[1] wherein it was adjudged by a unanimous Court that the invention (which was patented) was the property of the employer, even though there was no express agreement to assign the invention to the employer. The employee, Peck, personally, and for his own sole behoof, had applied for, and obtained a patent and thereupon sued the successors of his employer for its infringement. The latter counterclaimed, contending that it was the rightful owner of the patent, having purchased or succeeded to the assets and business of Peck's employer. The District Court sustained the counterclaim and ordered assignment of the patent. The Court of Appeals reversed this judgment, but was in turn reversed by the Supreme Court which affirmed the District Court's decree. The Supreme Court's decision was somewhat remarkable for its rather caustic comment on the Court of Appeals' decision,—as a "putting aside" or "underrating" of its previous decisions and treating them with the "inconsequence of dicta."

The next case to come before the Supreme Court was *U. S. vs. Dubilier Cond. Co.*[2] in which the Government was the employer and the employees were regular employees, in a scientific or technical (radio)

1. 264 U. S. 52.

2. 289 U. S. 178.

capacity, of the Bureau of Standards. In this case the Supreme Court was very sharply divided, with three justices, including the Chief Justice, dissenting in a lengthy opinion, with short separate dissent by the latter. In the meantime two other cases had been decided by courts of appeals adjudging the employer, (the Government in both cases) to be the owner of the invention.[3] Certiorari was denied in both these cases.

The basic question in all such cases is relatively simple, being that of the ordinary contractual relation of Master and Servant or employer and employee. It has, however, been confused and complicated by the intrusion of patents, patent law and the nature of the right granted by a patent. But there is not, *necessarily*, any relation between inventions and patents, since it is entirely optional with the owner of an invention whether he will patent it or not. He can make, use and vend his invention and license others to do so regardless of the patent laws,[4] since a license is merely a personal contract respecting the *invention*, but passes no interest in the *patent*. Hence the absence from the patent laws of any provision for, or reference to, licenses. A license is, in fact, the antithesis (or waiver) of the patent, the sole right in the latter being to *exclude from* the invention.[5]

Confusion of a patent with invention appears in the majority opinion in the *Dubilier* case, *supra*, wherein, under the heading "First" it is said: "Though often so characterized a patent is not, accurately speaking, a monopoly &c . . ." This must certainly be regarded as *obiter*, because whatever a patent may be considered to be, whether a true monopoly or something else, it would still remain that same thing regardless of whether it rightfully belonged to the employees, as the majority held, or whether it rightfully belonged to their employer. Moreover, a patent and all rights granted thereby is defined by the Constitution itself and by the patent laws, (sec. 4884 Rev. Stat.), and, hence, can be nothing different no matter into whose hands it may come as its rightful owner.

The declaration that a patent is not, accurately speaking, a monopoly is based upon the statement that "a monopoly takes something from the people." whereas "An inventor [patentee?] deprives the public of nothing which it enjoyed before his discovery, but gives something of value to the community by adding to the sum of human knowledge." The early case of *Seymour vs. Osborne, 11 Wall. 516*, is cited for the statement that a patent is not, accurately speaking, a monopoly. This doctrine is, however, entirely contradicted by the Court's later holding in *U. S. vs. Bell Tel. Co.*,[6] wherein it is held; "The United States, by issuing the patents which are here sought to be annulled, *has taken from the public rights of immense value* and bestowed them upon the patentee . . . *taken from the people this* valuable privilege and conferred it as an exclusive right upon the patentee. . . *This has been taken from the people*, from the public, . ." (italics supplied). This latter definition of the patent-right is vital, since upon it rests the right, and the procedure, for annulling or cancelling a patent,—a right that belongs to the public only, and is not available to any private party or individual; nor available as a defense in a suit for infringement, as this decision points out, (p. 372, loc. cit.). Hence, according to this later declaration, a patent complies with the definition given of a true monopoly.

That the doctrine of this *Telephone* case is the sound one further appears from examining the terms of the patent grant itself, as well as from other considerations. The terms of the patent grant are (Rev. Stat. sec. 4884): "Every patent shall contain . . . a grant to the patentee . . . for the term of seventeen years of the exclusive right to make, use and vend the invention or discovery throughout the United States and the Territories thereof . . ." It will be noted that no right whatever is granted in or to the *invention* itself, or to the *patentee's* own right to make, use and vend it; all that being already the inventor's property, *ab initio*. As owner of the invention, he could do all that with or without applying for or obtaining a patent.[7] This is also clearly stated in the *Paper Bag Patent case, supra*, wherein the Court said, referring to "a number of cases": "Those cases declare that [the patentee] receives nothing from the [patent] law that he did not have before, and that the only effect of the patent is to restrain others from manufacturing and using that which he has invented." (p. 424 l. c.). Thus the sole right an inventor obtains from the patent law is to restrain, or exclude, the public from its inherent right and liberty of engaging in industry, trade and commerce ("making, using and vending") and to confer all this upon the patentee exclusively,—but, and significantly, *for only a specifically limited time*. If it were generally true that an inventor, i. e., any particular inventor, conferred by *his* invention something of value upon the public, and that but for *him* the public would never have had it at all, then there would hardly seem to be any justification for limiting his sole employment and possession thereof to a specified time, nor for requiring him to submit to certain procedure and formalities, and especially to pay certain fees in order to obtain the right ("grant") of exclusive use and enjoyment, and then for only an arbitrarily limited period, of that which is entirely his own. But it is scarcely ever true that the public is dependent upon any particular inventor for a given invention, or its substantial equivalent. The faculty or genius of invention is much too common or universal. Patents are not so much granted to applicants because they have invented the particular thing as because they were the *first* to have done so,—among a number of others.[8] It is a commonplace that substantially the same invention is made, and at about the same time, independently, by a number of inventors in different parts of the country, or of the world. The patent laws themselves had early to take account of this phenomenon, making provision in two separate sections of the Revised Statutes: (1) sec. 4904, for "interferences" between a plurality of inventors demanding a patent for substantially the same invention, and authorizing the Commissioner to deal with that situation; and (2) sec. 4918, providing for the situation of interfering patents. There is also the fact that a considerable proportion of patents that are brought into litigation are adjudged invalid because the invention is found to have been anticipated by prior inventors or published knowledge. Experience shows that very rarely indeed is the world dependent upon any particular inventor for any desired invention in science or the useful arts. A real or supposed want for any particular improvement in any of the arts has only to be manifested to bring forward a number of inventors to supply it, sooner or later. History of the

3. Houghton vs. U. S., 22 Fed. (2) 386; Moffett vs. Fiske, 51 Fed. (2) 868.
4. U. S. vs. Harvey Steel Co., 227 U. S. 165.
5. Paper Bag Patent Case, 210 U. S. 405.
6. 126 U. S. 315, 370.
7. Ex parte Brosnahan, 18 Fed. 62.
8. Milburn Co. vs. Davis & Co., 270 U. S. 390.

race shows the human mind or intellect to be insatiably, or incurably, inventive or creative.

That the public is deprived of something by its grant of a patent seems to be further evident from what happens when the limited time for which it was granted expires. When that happens, the invention thereof becomes, *ipso facto* and *automatically*, public property. In other words, the public simply *resumes* its right to make, use and vend it,—becomes *re*-vested with the rights it had before granting the patent. No act, deed, transfer or conveyance by the patentee is required to pass these rights to the public; they pass automatically. A patent may, therefore, be likened to an estate granted for years with reversion or remainder to the grantor, the public.

There appears too much to the contrary in the long history of patents jurisprudence in this country alone, (nearly a century and a half), to adopt, as a ruling principle, that a patent is not a true monopoly, accurately speaking. As the Supreme Court said in *Paper Bag Patent case, supra*, of the patent grant: "In other words, the language of complete monopoly has been employed . . ." (p. 423 loc. cit.). It was early pointed out by Mr. Justice Story in the much-cited case of *Pennock vs. Dialogue*,[9] that our patent laws, like those of Great Britain, derive their essential principles and features from the *Statute of Monopolies*, 21 Jac. I, c. 3, of which he said: "That act, after prohibiting monopolies generally, contains in the sixth section, an exception in favor of 'letters patent and grants of privileges . . . of the sole working or making of any manner of new manufactures within this realm, to the true and first inventor . . . which others, at the time of making such letters patent and grants, shall not use.'" (p. 20, loc. cit.). And quite recently Mr. Justice Brandeis noted in *Standard Oil Co. vs. U. S.*[10] that: "Historically, patent grants were only narrow exceptions to the general public policy against monopolies which developed from the Case of Monopolies, Moore 671, 11 Co. 84, and culminated in the Statute of Monopolies, 21 Jac. I, c. 3, secs. V-VI." (p. 169, l. c., see note).

The most eminent text-writer in this country on the Law of Patents (Robinson) regards the doctrine that a patent is a true monopoly as being vital to "the future safety of the entire patent system." He devotes a whole chapter (ch. 2, vol. 1, pp. 16-67, Rob. Pats.) to this one subject. At page 51, sec. 32, he states: "That a patent privilege is a true monopoly, derogatory to common right, is, therefore, the correct theory concerning it considered in itself. If courts and legislatures, by abandoning this theory, have drifted into lax and dangerous modes of dealing with the public interests when opposed to those of the inventor, it is apparent that the future safety of the entire patent system, and the protection of the people from unreasonable and oppressive patent privileges can only be secured by such a return to this theory as shall result in the adoption of a just and permanent dividing line between these constantly conflicting rights." In sec. 23, p. 37, he states: "Such an investigation [of the relations of inventor and public to the invention] will disclose not only that a patent privilege is a true monopoly, but that it approaches very nearly to an odious monopoly in its restriction of the pre-existing public right." His summary, (p. 67), is: "I. That the patent privilege is a true monopoly, granted in derogation of the common right,"—a conclusion in harmony with the quotations made from the *Telephone case, supra*.

Moreover, if patents are, as shown, an *exception* to monopolies condemned by the Statute of Monopolies, then they must belong to the same class in order to be an exception thereto.

Inventors and discoverers are universally conceded to be deserving of public recognition or reward; but the problem has been how to measure or apportion rewards or recognition fairly or equitably to other inventors in the same art, or in different arts, and to the public. The grant of patents is apparently the only practical expedient, since the reward thereby obtained by the inventor is more or less automatically measured by the public's estimate of the value, or utility, or advantage, derived from the invention. That is, if there is an extensive public demand for the invention, the extent of the patent monopoly is correspondingly large; and on the other hand, if very few people, or no one, wants to make use of the patented invention there are correspondingly few, or no one, to be excluded therefrom by the exclusive rights granted by the patent to the patentee. Obviously, this way of rewarding inventors takes no account of the character of the invention, as such,—whether involving genius or knowledge of a very high order, or only of such minor character as to be doubtful on which side of the border line of "expected skill of the art" it should be placed, a "mere carrying forward" of the art, or "a distinct step in advance." The same monopoly is granted to all, and the reward depends upon the extent of public demand, and the willingness of the public to pay tribute to the patentee (which is included in the selling or market price demanded for the patented device.)

Attention has recently been directed toward inventors and discoverers in the broader fields of science for whom no public rewards are provided. As Robinson pointed out (Rob. Pats., vol. 1, p. 43) ". . . the field of patentable invention is comparatively narrow. By far the greater and the most useful portion of human discoveries lie outside the domain of these exclusive privileges." This has led, somewhat recently, to the appointment of committees by various bodies, including the League of Nations, American Association for the Advancement of Science, Michigan Patent Law Association, and others, for the purpose of ascertaining or proposing means for securing to inventors and discoverers in science proprietary rights in their discoveries. Recently the *New York Times* commented editorially upon the negative results reported by these various committees, under the heading "Scientific Property," (N. Y. T., Feb. 11, 1934). The point is tersely stated in the opening sentences, viz: "The man who invents a machine makes millions. Maxwell and Hertz, who laid the basis of what is now radio, made only reputations. True, they were quite content with their lot, yet injustice in the distribution of rewards to the inventor of trifles and the creator of new theories which prove to have a practical value is bound to arouse discussion." This situation finds a somewhat striking illustration in the recent case of the patent for the "high vacuum" radio tube (*DeForest R. Co. vs. Gen. Electric Co., 283 U. S. 664*). In that case, after reviewing the scientific discoveries of Lilienfeld and others, the Court said: "The narrow question is thus presented whether . . . the production of the tube of the patent with the aid of the available scientific knowledge that the effect of ionization could be removed by increasing the vacuum in an electric discharge device, involved the inventive faculty or was but the expected skill of the

9. 2 Pet. 1.
10. 283 U. S. 163.

art. . . Once known that gas ionization in the tube caused irregularity of current which did not occur in a high vacuum, it did not need the genius of the inventor to recognize and act upon the truth that a better tube for amplifying could be made by taking out the gas." (p. 682, l. c.). This is to say, in effect, that it was to the scientists or discoverers of the principle and effect of high vacua in electronic discharges, and not to the patentee of the tube, that the public owed the benefits resulting therefrom,—and yet the discoveries or "inventions" of the former lie outside the domain of the patent laws. This fact, however, as the *Times* editorial comments, has never deterred scientists from their explorations nor halted the march of knowledge. It might well be said that the human mind or intellect is incurably and irrepressibly inventive, or, like the "Elephant's Child," endowed with "satiable curtiosity," or forever wanting to know what there is "beyond the ranges."

It is often repeated, with the idea of showing the inventor's right of property in his invention, that he may keep it a secret if he chooses. No one would contend, however, that his invention is not the property of the inventor to begin with. The question is whether or not he has done anything, or entered into any undertaking or obligation, whereby ownership of the invention, or rights of user therein, has passed to others. It hardly seems that the ability to keep it secret can be relevant to what rights others may have acquired therein. It would seem that to keep an invention secret, while at the same time obtaining a revenue from its use in industry, is almost a practical impossibility,—except in very few cases. Of course, if really kept a secret, buried in the bosom of the inventor alone, and not used in the arts or industry for fear of discovery, it is of no more benefit, even to the inventor himself, than was the hay to the dog in the manger of the fable. If he attempt to use it in industry, the chances that it will be discovered by those interested are much greater than that it will baffle discovery. Also, in order to work such inventions as are more or less capable of secrecy, the assistance of others can scarcely be dispensed with, and then the owner of the secret is subject to betrayal or breach of confidence, particularly under temptations from competitors, or covetousness. The argument from secrecy has little or no practical weight. Besides, invention, like any other form of intellectual creation, is self-expression, and the almost irresistible urge is to rush out into the street shouting "Eureka!" And again, the universality of the genius or faculty of invention practically forbids that secrecy on the part of one inventor means secrecy as to the *invention* itself, which is quite likely to be invented by others.

A phrase almost always encountered in discussions of the respective rights of employers and employees in the latter's inventions is that he was *"not* employed to invent,"—a phrase that seems seldom to be used in the affirmative form. This, in the writer's opinion, is one of those phrases that, to borrow Mr. Justice Holmes' expressive phrase, has become *"encysted"* in the law and thus ceased to provoke analysis. (The patent law is very subject to such encystments.) It is very doubtful that anyone ever was employed, categorically, to invent, or to "exercise his inventive faculty, or inventive genius." The ability to perform the undertaking or covenant is much too uncertain for anyone to incur the consequences of non-performance. Would not the employer in such case be entitled to recover all salary and wages paid, and cost of all material, use of apparatus or machinery, &c., &c., consumed and employed by such employee who failed to perform his covenant to invent? Besides, who shall say that what such employee has produced is, or is not, invention? If invention is said to be genius or spirit, a sort of afflatus, the "birth of an idea," can it be summoned at will as in undertaking a contractual covenant to invent? Hotspur remarked that he, or anyone, could *call* spirits from the vasty deep, "but *will they come* an you do call them?" This phrase "employed to invent" is practically never an express term of a contract of employment, but only a deduction or conclusion from the character or nature of the employment. Contracts of employment that mention inventions, such as those used by large industrial concerns, specify invention in the conditional or potential mood, as: "inventions he *may* make while in the employ" &c.

The further difficulty with the phrase "employed to invent" is the practical impossibility of identifying or defining invention. The attempt to do so has long been practically abandoned by the courts. The Supreme Court has said: "The truth is the word cannot be defined in such a manner as to afford any substantial aid in determining whether a particular device involves an exercise of the inventive faculty or not. . . . —whether the variation relied upon in a particular case is anything more than ordinary mechanical skill is a question which cannot be answered by applying the test of any general definition."[11] Judge Learned Hand, with his well known insight and clarity of statement, has recently held: "If genius is demanded, surely he was no inventor; rather he was one of those who, taking the knowledge at hand, worked out its implications in the laboratory. There are indeed expressions in the books which, taken literally, would exclude such work from the protection of the patent laws; there are others which would not. But we deprecate such *a priori* rules for determining invention. Nothing has tended more to confuse and obscure the issue than the attempts of courts to lay down generalities. The issue does not admit of such treatment, for invention is always a function of the particular situation, of the conditions which preceded and followed the appearance of the composition or machine. That this is a treacherous standard is true enough, but at least it is less treacherous than easy absolutes which fit the immediate occasion, but lie athwart any realistic treatment in the next case."[12] The Supreme Court has said: "A patentee [inventor] may be baldly empirical, seeing nothing beyond his experiments and the result; yet if he has added a new and valuable article to the world's utilities he is entitled to the rank and protection of an inventor."[13] If bald empiricism may be ranked as invention and justify the grant of a patent monopoly, what has been called the "genius," or even the "faculty" of invention largely disappears as any test that an invention has been made. In the case decided by the Court of Appeals, 2nd Circuit, through Judge Learned Hand, *(ubi supra)*, it is said: "True, all that Flaherty did was to carry out what was already known, and by *trial and error* fix the limit which should be observed." This was held to be invention. From such definition it is apparent that the case for ownership by the employee, as against his employer, of *the result* of "trial-and-error" experiments connected with the duties or work he is hired to perform, is reduced to a minimum. It would seem that the application of such definition of invention by the Court of Appeals in the *Dubilier* case must inevitably have resulted in a judgment in favor of the employer, the Government, since

11. McClain vs. Ortmayer, 141 U. S. 419, 427.
12. E. I. Dupont vs. Glidden Co., 67 Fed. (2) 895.
13. Diamond Rub. Co. vs. Consol. Tire Co., 220 U. S. 428, 435.

it was considered that the latter's contentions "can be sustained only by giving the word 'research' the meaning of the word 'invention'."[14] As invention may be "bald empiricism," or "trial and error," it would seem to follow that the word "research" may very well be considered as synonymous with the word "invention," with the result that such "research" was no more than a performance of the work which such employees were hired to perform. It would hardly seem to be a reasonable or sound basis for determining conflicting property rights to rest that determination upon the very uncertain, shifting, and really undefinable term "invention." It is a question of *fact,* rather than of uncertain terminology, whether or not what the employee has done was fairly within the character or scope of the duties he was hired, and undertook, to perform,—was "within the scope of his employment"—regardless of whether or not what he did might be *called* "invention."

Where the "Government" is the employer, it has been held that it is no different in these respects from any other employer. But is this really true? *Who or what is the "Government"?* Certainly the "Government" has a different status from any private person. According to the *Telephone case, supra,* the Government is the public itself, its representative, agent, instrumentality,—its *alter ego.* Are the Government's employees properly called *"public servants,"* or is this only a *façon de parler?* If the term is proper, then it is difficult to see what the "no-fee" act of March 3, 1883, even as amended April 30, 1928, accomplishes, since the license to the Government is the same as a license to the public, the Government's principal. If the public is licensed to use, manufacture and vend a patented invention, that is tantamount to extinguishing the patent, whose sole virtue and effect is *"exclusive"* rights,—to *exclude* the public. Possibly this consideration was what was in the mind of the dissenting justices in the *Dubilier case, supra,* in stating their opinions that the patents in question should be cancelled, and that the people of the United States should have the unrestricted benefit of the inventions.

The question, then, resolves itself into the single one of whether or not an *invention,* or what the parties suppose to be invention, made by the employee belongs to him or to his employer. (Patenting the invention is a subsidiary matter, and really extraneous to the question.) Ownership of an invention, before, after or even regardless of, applying for, or obtaining a patent therefor, may, and often does, pass from its original owner (its inventor) to others. The inventor may die, become insane, bequeath his invention, assign it to another; for which contingencies the patent laws and Rules of the Patent Office provide, (Rev. Stat., secs. 4884, 4896, Pat. Off. Rules 5, 6, 20). The owner of the invention has the inchoate right to a patent therefor, which right he can perfect by complying with the requirements of the patent laws.[15] The patent grant is based upon ownership of the invention, and not *vice versa. (Crown Co. vs. Nye Tool Wks.,* 261 U. S. 24.)

Obviously, and as is frequently the case, the original owner of an invention (its inventor) may have encumbered, or assigned, his ownership thereof before applying for a patent, or after applying but before any patent is, or could be, granted therefor. He may have entered into contractual relations with others involving or respecting his invention, the legal consequences of which may be either a license or an outright assignment. One such contractual obligation he may have entered into is that of employment, in the course of which, or in consequence of which, he may have made the invention. It is the legal or judicial interpretation of such contractual obligations, and their proper implications, that determines the rightful ownership of the invention,—and hence of the patent, if any. That this is a question of general or contract law, and not of patent law, is apparent from its frequent adjudication by State courts, even when a patent has been granted.

One noteworthy instance of this is that of *Annin vs. Wren*[16] wherein the facts and situation of the parties do not appear to be essentially different from those in the *Standard Parts case, supra.* The employer's business was manufacturing wheelbarrows and trucks; Wren being an employee therein upon a weekly salary "to apply himself personally to the development of this business: he went under that name with us." As in the *Standard Parts case,* nothing appeared to have been said between the parties as to *inventing,* or patents; but it was held:

"This work of inventing was what plaintiff called *'developing* (sic) the wheelbarrow business,' that being a phrase covering the work of inventing both wheelbarrows and trucks. This was also clearly understood by both the contracting parties. The invention was perfected during that service." (p. 355) . . . "The special service of inventing is the entire scope of the employment. There is no room left within the employment for inventing on his own hook. The servant has no right to think or invent for himself on this particular subject matter in hand. He must get out of such a relation before he can claim the product of his work under such an employment. He cannot carry off both his salary and the only valuable product of his work under such an employment, leaving his master with his useless models, the results of his uselessly spent money on tools, machinery, time, labor of self and employees, with only a license or shop right which is not assignable or useful in any way save to himself. Such a result would "necessarily defeat the whole purpose of the contract and the contracting parties." (p. 356) . . . "Considering the relation of the parties and the nature of the employment, it would equitably follow that the patents should belong to the plaintiff, if any were obtained as the result of the joint development of the parties." (p. 353.)

It may be noted that in the *Standard Parts case* also, the Supreme Court found that: "By the contract Peck engaged to 'devote his time to the *development* of a process and machinery' . . ." (p. 59 loc. cit.), and their judgment was that the resulting *invention* (patent) belonged to the employer. Hence, in such cases, "developing" is considered to be synonymous with "inventing,"—which, if "bald empiricism," or a process of "trial and error," may be invention, is not a very strained synonymity.

It may be pertinent to note that the "shop right" or license is generally supposed to flow to the employer in such cases *because* of the employer-employee (master-and-servant) relation between the parties. But the genesis or foundation of the doctrine, if examined, does not necessarily require that relation of the parties. The doctrine has its origin in *McClurg vs. Kingsland,*[17] wherein the employer's license or shop right was put on the basis of the *consideration* due the one party (who *happened* to be the employer) in return for the costs he had defrayed in furnishing the facilities, machinery, tools, material, &c., for developing the other party's inventive ideas or concept. But the same conclusion

14. 59 Fed. (2) 384.
15. Gayler vs. Wilder, 10 How. 476, 492.
16. 44 Hun 352; (51 N. Y. Sup. Ct.).
17. 1 How. 202.

would be equally valid had the relationship of master-and-servant not existed, and the parties joint enterprisers or "partners" in the project,—one furnishing the ideas and the other the money or means. In the *Annin* case, *supra,* the invention is referred to as "the joint development of the parties."

It may also be pertinent to note that this license or shop right passes as to all inventions developed in these circumstances, whether the patents therefor were granted under the "no-fee" act or under the regular patent laws which require fees. Hence, as in much the larger majority of instances wherein Government employees are concerned the Government furnishes the facilities, and defrays the cost of developing its employees' inventive concepts, it did not require the "no-fee" statute to give the Government a license to use the invention. As to that, it may indeed be said that "the Government is no different from any other employer."

The point is, that the question is one of general or contract law, and not one of patent law, which, if allowed to intrude, tends to confuse, rather than to clarify, the respective rights of the parties. It should also be borne in mind that invention is not only ideas, or inventive concepts,—so far at least as the patent laws are concerned. Invention includes no less the *means* for bringing the concept to practical use or operation,—"reduction to practice," as the phrase is. It is usually the employer, in such cases, who contributes this part of the invention; and were it not for his employment, the employee's inventive concept might remain no more than that, or might not have occurred to him at all.

After all it resolves itself into the old and familiar case of: Was what the employee did "within the scope of his employment?" And to determine that, evidence of all the *facts* of his employment, duties or service is required.

CURRENT LEGAL LITERATURE

A Department Devoted to Recent Books in Law and Neighboring Fields and to Brief Mention of Interesting and Significant Contributions Appearing in the Current Legal Periodicals

Among Recent Books

THE FEDERAL GIFT TAX. By Kingman Brewster, James S. Y. Ivins, and Percy W. Phillips. 1933. New York: Clark Boardman Co., Ltd. Pp. xi, 145.—There is every indication that the Federal gift tax, incorporated into the Revenue Act of 1932 and increased in rates in the Revenue Act of 1934, will remain as a part of our Federal tax system for many years to come. Evidences of this lie in the ever increasing need for Federal revenue and in the value of the gift tax as a preventive of estate tax avoidance. The resultant likelihood that the burden will not be substantially reduced by postponement of gifts, and the certainty of death with attendant estate taxes, makes it essential that counsel for a prospective donor acquaint himself diligently with the provisions of the gift tax and its possibilities if his client is to avoid the penalty of ignorance.

This book goes to these purposes. It presents in readable style the fundamentals of the gift tax. Although the book has its chief importance as a text for the uninitiated, the chapter on "Transfers Subject to Tax" contains suggestions for minimizing income, estate, and gift taxes which may prove of value to numerous practitioners. The work is also helpful in its frequent exposition of the relation between the gift tax and estate and income taxes, and in occasional criticism of the administrative regulations.

The elementary character of the book may limit its use as a reference work. Nevertheless, it may usefully be referred to for suggestions in the solution of specific problems. Within its covers will be found numerous citations, frequent quotations from the departmental regulations, and appendices, setting out relevant forms and the text of the statute. The usefulness of the book appears to be but very little impaired by the amendments contained in the Revenue Act of 1934. The work, as is to be expected from its producers' prior publications, has been carefully done.

* *

Taxation of Foreign and National Enterprises: Volumes II, III, IV and V. 1933. Geneva: League of Nations.—An inquiry was begun several years ago under the auspices of the Fiscal Committee of the League of Nations to provide the data required for framing a draft Convention to prevent the double taxation of business income. These volumes, and an earlier volume I, published in 1932 and reviewed in the July, 1933, number of this JOURNAL, pp. 412, 413, are the result of that study. Upon the basis of the data thus acquired the Fiscal Committee on June 26, 1933, adopted a draft Convention intended to serve as a model for conventions, bilateral or multilateral, to avoid double taxation between nations.

The work evinces a careful organization, consistently followed, designed to reach a specific end—a practical system of allocating income from business of an international character in such a manner as would, if adopted, prevent the imposition of a tax by any particular country on more than its fair share of the income. The first three volumes are calculated to supply the basic data, the fourth an evaluation of the data and the outline of the recommended system, and the fifth the reduction of the system to accounting methods.

The treatise, in its conception, reveals an appreciation of international needs, characteristic of its sponsorship, and, in its execution, the usual sound judgment and exhaustive research under a Rockefeller Foundation grant.

Volume II (pp. 467) and Volume III (pp. 254), following the plan of Volume I, are devoted to the income tax systems of important sovereignties with particular consideration to their practice in allocating the income of enterprises doing business in more than one country.

Volume IV (pp. 219), bearing the subtitle "Methods of Allocating Taxable Income" is written by Mitchell B. Carroll, the director of the inquiry. The author first discusses the problems involved in the allocation of income among the various governments under which the taxable entity is doing business. The legal principles and methods employed in allocation are then summarized, compared, and classified. The rule generally prevalent in the British Commonwealth, the rule found generally in continental Europe, and the rule characteristic of the United States of America, are compared. The author closes his volume with an all-important chapter in which certain principles and methods of allocation are recommended for adoption. It is these conclusions toward which the survey has been so largely directed. There is first laid down, as a principle of jurisdiction, that an enterprise shall be taxable only in its fiscal domicile or in the jurisdiction where income has its source. After elaborating upon these terms the author suggests the situation in which the fiscal domicile shall impose the tax, and the instances where a jurisdiction (other than the fiscal domicile) in which the income has its source, may assert the liability. There is a detailed consideration of methods of allocation where the purchase, processing, and sale of goods occur in different countries, and in many other circumstances. Procedures for settlement of disputes are proposed.

Volume V (pp. 78) by Ralph C. Jones outlines different accounting methods which may be utilized in different situations in order to assist in the problem of allocation. The author admits the practical certainty that profit can never be allocated between countries with a high degree of scientific precision, but offers his study as affording an aid to refinement of methods.

The treatise as a whole, and the fourth volume in particular, while perhaps of greatest direct importance to governmental bodies (both legislative and executive), should be of use to business associations and enterprises engaged in foreign trade, and to their counsel, in securing relief by legislation and convention from the burdens of double taxation in the international field. This study has already disposed in a tentative manner of some of the more technically involved questions and if the negotiations looking toward conventions and treaties can be kept in an atmosphere of mutual concessions the results may abundantly justify the painstaking efforts expended in this admirable study.

GEORGE M. MORRIS.

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The Modern State (The Century Co., 1933, pp. 316), is a reprint of a series of talks broadcast over the B.B.C. in 1932 by Leonard Woolf, Lord Eustace Percy, Mrs. Sidney Webb, Prof. W. G. S. Adams and Sir Arthur Salter, dealing with the fundamental concepts of democracy, its development under and correlation with economic and social evolution, the problems it faces, its weaknesses and strength, and its possibility of survival. This series was itself a part of a comprehensive symposium on "The Changing World."

The talks are printed substantially as delivered over the radio, and the explanations and reservations which would ordinarily be made, were the material prepared primarily with an eye to publication, are lacking. While this manner of treatment may detract from the book's scientific value, it rather adds interest to the casual reader, such interest lying more in the thoughts suggested than in any dogma expounded or panacea proposed.

We are too prone to assort political science, sociology, economics and law to separate pigeon-holes as in a college curriculum and to overlook the interrelation one with another. We are likewise accustomed to think or speak of democracy without any very clear conception of what it means or why it exists and wherein it is any more desirable than would be some other form of political economy. It is well to be reminded that the modern state essentially reflects the influence of economic and social conditions growing out of the industrial age, and that changes in industrial conditions have affected the functions of the state in respect of both domestic and international problems. *The Modern State* attempts to furnish the broader outlines of such a survey.

One imperfection of democratic institutions (which is manifest not alone in Great Britain) is stated by Lord Percy: "We are all electing various people, company directors, trade union officials as well as local municipal councillors and members of Parliament, to look after this or that section of our interests; and all this apparatus of representative organization tends to result in mental petrifaction. We do not think for ourselves, because we have elected people to think for us; and the people we have elected to thing for us dare not, for that very reason, think for themselves. This is the vicious circle in which we are all involved." Such a work as this is helpful as a statement of the problem, a necessary step in any effort to stimulate individual thought and action.

HERMAN PHLEGER.

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More and Better Wills—Testamentary Benefactions. Edited by Alfred Williams Anthony. 1933. New York: Committee on Financial and Fiduciary Matters, Federal Council of the Churches of Christ in America. Pp. 108. Cloth, $1.00; paper, $0.75.

Last Wills and Testaments, by Carl W. Mueller. 1932. Published by the author, San Francisco, California. Pp. 91. $1.23.

Wills, Executors, and Trustees, by William J. Grange, Walter A. Staub and Eugene G. Blackford. 1933. New York: The Ronald Press Company. Pp. xxxi, 844. $7.50.

That the majority of property owners in America either underestimate the importance of making a will, or, if they are cognizant of the value of a testamentary disposition, put off the execution of the instrument until it is too late, is evidenced by the fact that only about one-third of the estates in this country are being settled under wills. In England it is estimated that about four out of every five estates are disposed of by the wills of the decedent owners. That the three books under review will serve the general purpose of

making their American readers more "will-conscious" is unquestioned.

The first of these books, *More and Better Wills*, publishes in pamphlet form the papers which were presented by lawyers, trust officers, and laymen representing various organizations and foundations, at the sixth biennial conference of the Committee on Financial and Fiduciary Matters of the Federal Council of the Churches of Christ in America. In these papers were discussed such topics as: "Where There Is a Will There Is a Way," "Losses Through Failure to Make a Will," "Vanishing Estates and Hazards," and "The Keeping of the Trust." While the obvious purpose of the Committee in publishing this material was to promote and encourage wise public giving to charitable and eleemosynary institutions by stimulating interest in the execution of more and better wills, a reading of the material will give to the American public a keener sense of the importance of making wills and of changing those already made to meet the exigencies of shifting business and financial conditions or of changes within the circle of the testator's family.

With reference to the law governing wills, their execution and probate, and the administration of estates, Carl W. Mueller in his book on *Last Wills and Testaments* has given us a superficial paste-pot-and-scissors job, which consists chiefly of quotations from texts, judicial decisions and statutes. His discussion of the legal aspects of wills is confined largely to the applicability of California law to the subject and will be of interest only to prospective testators and practitioners of that state. His book is rather unique in several respects. On opening the book one finds several letters from members of the California judiciary highly recommending Mr. Mueller as an attorney and author. He also staunchly defends the lonely position of the Wisconsin court that the right of a person to make a will is a fundamental. natural right, and not a privilege dispensed or withheld at the pleasure of the legislature—as has been decided almost unanimously by the courts of this country. He does not favor trusts nor does he believe trust companies are to be trusted; rather he believes that faith and confidence should be had in the ability of each succeeding generation to stand on its own bottom and to administer successfully property left to its care. The book is fairly easy reading for the layman and contains practical suggestions which should prove helpful to the prospective testator.

Written by an experienced attorney, a certified public accountant, and a trust officer of a metropolitan bank, and coordinated into a unified whole, the book on *Wills, Executors, and Trustees* is a most important and valuable addition to the literature of the law dealing with the disposition of property after the death of its owner. The scope of this comprehensive work may best be indicated in the language of the authors in the preface: "This book presents in concrete, practical form the basic facts and rules of law relating to wills and inheritance; how and why a will should be made; how the estates of deceased persons are administered; why and how trusts are made and their operation, and in connection with all of these subjects a carefully selected group of suggestive practical forms has been included. There is also a detailed treatment of estate and trust accounting with specimen forms of the necessary account books with instructions as to their use." This book is written in a clear, non-technical style and affords a mine of valuable information for the ordinary layman seeking advice on the proper execution of a will, for the lawyer drafting testamentary instruments and setting up trusts for his clients, for the accountant whose work carries him into the realm of estate and trust accounting, and for the fiduciary whose task has become more complex and exacting because of the changes in the general financial and economic situation in recent years. Of particular value are those portions of the book which consider in detail the powers, duties, and responsibilities of fiduciaries —executors, administrators, guardians and trustees. Of equal importance with regard to the orderly and successful administration of estates is the material dealing with estate and trust accounting. Literature on this subject is scant and this portion of the book fills a long-felt need. The work is well rounded out by Part V which treats of banks and trust companies as fiduciaries, and by Part VI wherein is discussed in detail the subject of taxes as they affect estates and trusts. While the book does not purport to be a legal treatise in the technical sense, it does contain in support of the text numerous excerpts from and citations to pertinent statutes and leading cases. It is a book which may well be used with profit by layman, lawyer, accountant, and fiduciary.

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The Qualifications and the Duties of a Good and Complete Judge. A Discourse by Maitre Jean de Coras, Doctor of Laws and Counsellor of the King, before the Parliament of Toulouse, *circa* 1560, published at Lyons, 1605, translated and edited with an Introduction by Walter S. Johnson, Montreal, 1934. Pp. 138.

Not for many years has there appeared a work dealing with law and its administration in ancient and medieval non-common-law communities, characterized by such sound learning and painstaking thoroughness and accuracy as this little volume exhibits on almost every page.

The learned editor in 1928 found in a book-stall on the Seine—that veritable treasure-house of medieval literature, as I have seen more than once—a copy of De Coras' *Discours Des Parties et Office d'un Bon et Entier Juge*, first published at Lyons in 1605, and he has given us a translation with admirable notes, biographical and otherwise, also an introduction and a full index.

In the introduction we are told, *inter alia*, that Jean de Coras (1513-1572), a Protestant, a scholastic, a potential humorist, learned in the civil and canon law, which had largely supplanted the customary law in France, became professor of laws at the Universities of Valence, Ferrara and Toulouse. Made *conseiller* of the Parlement of Toulouse, he thus became a sovereign judge. Expelled, but reinstated, he remained in office until 1572, when, as a Huguenot, he was murdered, along with two brother judges and many others, by a number of orthodox students.

In his Discourse, here translated, De Coras touches "upon all the essential marks of a good and skillful judge—his age, his wisdom and experience, his learning and integrity," and of these five "marks" in order.

As to Age he agrees with Socrates that "a Judge must not be young, rather should be advanced in years, even an old man," and apparently approves the practice in Athens, which "conscientiously discouraged any

man . . . acting as a judge until he was at least in his sixties."

Wisdom shows itself in "good sense, sound judgment and undeviating rectitude." It is indicated (1) by becoming gravity, accompanied by ease of approach; (2) by wise and golden silence, the judge not even permitting "his eyes to moisten or his face to grow sad before the lamentations of the poor, the orphan, the widow or any other unfortunates . . . "; (3) by careful examination and judicious selection of authorities; (4) by hearing the parties willingly and kindly, but not accepting the inferences and deductions of the pleader, "which at times are absolutely in contradiction of the facts upon which alone the judgment must rest"; and (5) "one of the most essential elements of a judge's wisdom is that he shall not act precipitantly, with that cocksure haste which men have always rightly called the baleful step-mother of justice"—the old Roman maxim, *Festina lente*.

Experience of men and events is necessary—so the wise dictum of Manilius has it: *Per varios usus artem experientia fecit exemplo monstrante viam*, i.e., by divers trials experience creates the art and, precedent guiding, points the way of learning. Socrates truly said that the only good on this earth is learning and knowledge, ignorance the only evil. Authorities on all subjects should be carefully studied, medicine being specially insisted upon.

"Probity and integrity are above all things requisite in a judge; even more so than the maturity of age . . . more to be desired even than wisdom . . . knowing and seeing not the parties but only the cause and the question at issue . . . without respect to persons . . . no whit shaken from his duty . . . by fear, or hatred, or favour, or cupidity." There are some passages which suggest that the speaker had not our modern conception of judicial dealing with a statute, that is, to apply it, not to modify or criticize it; he seems to think that a judge should not follow the directions of a statute if contrary to the equity and justice of the cause. But it is to be remembered that even such a lawyer as Coke thought an act of parliament invalid if contrary to natural justice.

The whole Discourse is illustrated by anecdotes and quotations innumerable and from every source. Interesting as is the Discourse, many readers like this reviewer will find the introduction by the learned editor still more interesting, and at the same time instructive. It contains an account of the administration of justice in medieval France, which evidences careful and exhaustive examination of authorities, judicious selection of facts, and clear and eleggant presentation of the results of the labors. By no means the least interesting portions of the whole book are the biographical sketches by the editor of the many persons, ancient and medieval, referred to and quoted from.

This reviewer, in the name of all of like interests, thanks the editor for the wealth of information he has modestly given us in this little volume– well printed on good paper and well bound.

WILLIAM RENWICK RIDDELL.

Osgoode Hall, Toronto.

The Courts and the Public Schools, by Newton Edwards. 1933. Chicago: University of Chicago Press. Pp. xvi, 591.—In *The Courts and the Public Schools: The Legal Basis of School Organization and Administration*, Professor Newton Edwards has given a compendious and comprehensive discussion of the relation of the public school system to the State and the decisions of the courts by which the character of that relation has been announced, the organization and development of the system has been aided and guided, its powers and duties have been declared and the methods of their execution defined. The book is not a history of the origin, development, growth or progress of the public school system and does not concern itself with statistics or questions of curricula or pedagogic theory or educational reform. It is a law book whose purpose is to set forth the fundamental principles which govern the relation of the State to the schools and to collect and state systematically the rules of law applicable to the determination of the numerous questions which arise from time to time between school officers and teachers, teachers or school officers and pupils or parents of pupils, questions affecting the ordinary conduct of the school as a school and questions which arise in the operation of the school district as a quasi-municipal corporation by whatsoever name it may be known.

The first chapter is devoted to the consideration of the relation of the school to the State and is based on the theory that the public school is a State institution. This theory was opposed, in some cases, on the ground that the maintenance of public schools was a local question and municipal purpose and that the State was without power to impose taxes for any municipal purpose, though it might by general law confer upon the proper authorities power to levy and collect taxes for such purposes. It was also objected that the power did not exist to establish free schools for all children between five and twenty-one years of age, even in a State whose constitution required the legislature to provide by law for the establishment of schools throughout the State in such manner that the poor might be taught gratis. In all these cases, however, the courts, basing their judgments on the police power of the State, held that the acts in question were valid under the police power and the power was unrestricted except by the limitations of the State constitution. In this chapter, however, the author notes the fact that the Supreme Court of the United States in its later application of the fourteenth amendment of the constitution to legislation by the states has extended its original interpretation of the due process clause in the Slaughter House cases so as to bring within the review of the Federal court the judgments of the State courts on what constitutes a proper exercise of the police power, and to make that court the final arbiter of the validity of any educational policy of the State dependent upon the exercise of the police power.

The remaining 548 pages of the book are divided into eighteen chapters which constitute a methodical and adequate statement of School law in all its different phases, the organization of the school district and the election of the school officers, the building of the school house, the issuing of bonds, the power of taxation and methods of its exercise, the authority to contract, the liability of the district and the personal liability of the directors, the employment and dismissal of teachers. All these and many other subjects, too numerous even to mention in this review, are adequately treated and the principles of law mentioned are supported by the citation of many decisions.

The book is well written and well arranged. It

will be useful to lawyers, school officers and all who are interested in the school law. The detailed table of contents and the excellent index afford easy access to the particular subject of investigation.

FRANK K. DUNN.

Charleston, Illinois.

Double Taxation of Property and Income. By Arthur Leon Harding. 1933. Cambridge: Harvard University Press. Pp. x, 326. Because of the chaos caused by the incessant search and struggle of the different States and the United States for revenue, there is no thesis more urgent in the field of Conflict of Laws than a study and the presentation of a course which if consistently followed by the legislative bodies and the courts will eventually result in the ideal of taxation by a single State upon a single item of wealth. This ambitious result is the goal which Mr. Harding apparently believes possible of attainment.

He does not choose a new road; but rather clears the way, the direction of which has already been indicated by the United States Supreme Court in some recent decisions. The book is a worthy contribution to the field of Conflict of Laws as affected by the problems of taxation of property and income particularly.

In presenting his study, the author subordinates what he calls juristic logic to observable fact. He makes the point that in the administration of revenue acts the single place of taxation, if double taxation is to be avoided, should be the place at which the wealth is made useful and productive, where the business is carried on. The economic fact should determine the single place of taxation and not the old control theory, protective theory, or the maxim mobilia sequuntur personam exclusively. His new theory of taxation gives some consideration to old theories and maxims only in so far as they help in the determination of the economic fact. In other words, he presents a new theory of taxation which he attempts to show is a logical as well as the practical development from recent decisions of the United States Supreme Court. He calls this new theory an "integration theory of taxation." The subject is carefully analyzed and presented with convincing logic. Despite the prosy subject of "Double Taxation of Property and Income," the book is readable, and an interesting treatise. It will be found of real value to lawyers generally and to students of taxation in particular.

The volume contains running notes, court citations, and a table of articles and cases for the use of the reader in studying the subject further. It has an adequate index.

CLAUDE C. SMITH.

Philadelphia.

Leading Articles in Current Legal Periodicals

Marquette Law Review, June (Milwaukee, Wis.)—The Changing Philosophy of Taxation, by Ernest O. Eisenberg; Pedestrians' Rights and Duties—A Review of the Wisconsin Cases, by Allan E. Magee; Milwaukee's Approach to Juvenile and Domestic Relations Cases, by Virginia L. North.

Southern California Law Review, May (Los Angeles, Calif.)—The Minnesota Mortgage Moratorium, by William L. Prosser; Municipal Liability in Tort in California, Part V, by Leon Thomas David.

Notre Dame Lawyer, May (Notre Dame, Ind.)—The Constitutionality of New Deal Measures, by Clarence Manion; Shall we Democratize our War-Making Machinery? by Forrest R. Black; Extra-Territorial Jurisdiction of Courts of Chancery, by Charles Levin; The Digest, by Torquoto Carlo Giannini; Condemnation Proceedings, by James Regan Fitzgerald.

Columbia Law Review, May (New York City)—The Sales Tax, by Carl Shoup and Louis Haimoff; The Antecedents of Examination Before Trial in New York, by Hessel E. Yntema; Towards Legal Understanding: I, by Walter Nelles.

Rocky Mountain Law Review, June (Boulder, Colo.)—Monetary Legislation and the Gold Clause, by Frederick Putnam Storke; Right of State and National Banks to Give Security for Deposits, by Mark Henry Harrington; Formation of Informal Contracts in Colorado, Part II, by Sherman Walrod and William H. Robinson, Jr.

University of Cincinnati Law Review, May (Cincinnati, Ohio)—After the Nebbia Case: The Administration of Price Regulation, by Frank E. Horack, Jr., and Julius Cohen; The Mortgagee's Rights to Rents, by Morris Berick.

Dickinson Law Review, June (Carlisle, Pa.)—The Definition of Crime, by W. H. Hitchler; Married Women's Contracts of Suretyship, by F. E. Reader; Sir Edward Coke—A Gentleman of Rare Distemper, by Z. E. Green.

Yale Law Journal, May (New Haven, Conn.)—A Proposed State Collection Act, by Wesley A. Sturges; Judicial Method and Economic Objectives in Conflict of Laws, by Raymond J. Heilman; The Standard of Certainty in the Measurement of Damages, by Charles T. McCormick.

Yale Law Journal, June (New Haven, Conn.)—Indestructible Trusts and Perpetuities in New York, by William F. Walsh; Some Rationalism about Realism, by Hermann Kantorowicz; A Psychological Approach to Procedural Reform, by Henry H. Fowler.

Texas Law Review, June (Austin, Tex.)—The Texas Moratorium, by Leroy Jeffers; Mining Partnerships in Texas, by Lee Jones, Jr.; Early Courts and Lawyers of Texas, by Daffan Gilmer; Fitness for the Bar, by B. Eugene Gilbert.

North Carolina Law Review, June (Chapel Hill, N. C.)—Control of Electric Rates in North Carolina, by Frank W. Hanft; The Power of Congress to Levy Taxes for Distribution to States, by E. M. Perkins; Self-Deposit by Trust Companies of Fiduciary Funds, by H. B. Whitmore.

Air Law Review, April (Worcester, Mass.)—Notes on the Policy of the Administration with References to the Control of Communications, by Bethuel M. Webster, Jr.; The Present Status of the Ownership of Airspace, by Emory H. Niles; Liability and Insurance—The Relation of Air Carrier and Passenger, by Andre Kaftal.

United States Law Review, June (New York City)—The Constitution in the Light of Today, by Roscoe Pound; Judicial Disregard of the "Equal Protection" Clause as it Affects the Non-Religious, by Frank Swancara.

The Journal of Air Law, July (Chicago)—The Problem of Liability for Damages Caused by Aircraft on the Surface, by André Kaftal; The Legal Basis of Municipal Airports, by Robert L. Grover; State Aeronautical Legislation of 1933, by George R. Sullivan.

New York University Law Quarterly Review, June (New York City)—The Federal Constitution in Time of Emergency, by N. Henry Josephs; Textual Interpretation of Statutes, by Frederick J. de Sloovère; The Rationale of the Law of Fixtures: English Cases; by Russell Dennison Niles; The Home Owners Loan Act of 1933 and the New York 1933 Mortgage Moratorium Law, by Susan Brandeis.

Washington Law Review, June (Seattle, Wash.)—The New Washington Business Corporation Act, by Leslie J. Ayer; Right of Way at Highway Intersections in Washington, by John Fitzgerald; The American Law Institute's Restatement of the Law of Contracts with Annotations to the Washington Decisions, by Harold Shepherd.

A CONTRAST: THE FULL-TIME APPROVED LAW SCHOOL COMPARED WITH THE UNAPPROVED EVENING SCHOOL

By John Kirkland Clark
Chairman of Section of Legal Education and Admissions to the Bar

THERE are in this country today over two hundred law schools of different kinds and descriptions. Eighty-five of these, with a little less than half the total law school enrollment of the country, are approved by the American Bar Association. A knowledge of the other one hundred and twenty odd unapproved schools is a necessary forerunner of any plans for improving this situation. With this in mind the Council on Legal Education of the American Bar Association asked the cooperation of state and local bars in filling out a questionnaire concerning all the law schools of the country. Some hundred and fifty-two of these questionnaires were returned, and they give us some idea of how our law schools operate.

Instead of using total figures as shown by these returns, average figures are taken in making the following comparison between the full-time approved schools of the country and the unapproved part-time schools.[1]

The typical full-time law school is connected with an established college or university which in six cases out of seven owns the building used by it, while only one-seventh of the part-time schools have such a connection, and only five out of forty-eight own their own quarters. The typical full-time school has four to six full-time teachers, who carry an average teaching load of eight hours a week each, and one to three practising lawyers who teach three hours a week.[2] The part-time school usually has no full-time teachers,[3] but has ten or more practising lawyers on its teaching staff who each average from three to four hours' teaching weekly.

In library content the full-time approved schools are, of course, far ahead of the part-time variety as they are as a class much richer. Most of them have over 15,000 volumes and spend over $1,000 a year on books, and none less than 7,500 volumes, while the majority of part-time schools have less than 2,500 volumes and only one reaches over the 7,500 mark. The majority of part-time schools spend less than $250 a year on books and only 7 out of 48 report an expenditure of over $500 for this purpose last year.

None of the first of our two classes of law schools is completely dependent on fees for support, while 37 of the second class acknowledge such a dependency, seven others being partly so dependent and three not at all.

All approved schools require at least two years of college education for admission, while the typical part-time school has only a high school requirement. Mr. Andrews' classification, published in the last Journal, shows 58 part-time schools which require no more than this as contrasted with 32 having a two-year college entrance qualification.

The average yearly tuition of the full-time approved school is approximately $200, over 50 per cent more than the $120 which is the average charge at the part-time school. The former require authenticated records of pre-legal work which are carefully preserved, while it is the opinion of those committees or individuals reporting on the part-time schools that in over half of the cases those records are badly kept or not at all.

In the full-time approved school an average of 13 to 14 class room hours a week is required of all students, or a total of 80 semester hours for three years. The schedule is a little heavier the first year, approaching 14 hours a week, decreasing to 13 hours the second year and being slightly under that for the seniors. The part-time school averages just over eight hours a week for a total of 49½ semester hours required for graduation in three-year schools (11 of these are reported on) and 65 semester hours in four-year schools (25 cases). Although the school year of the part-time school is somewhat longer than is usual with the full-time school, a great discrepancy is observable between the number of hours of class room work required for graduation by the two types of institutions. The full-time approved school requires approximately 25 per cent more hours than the usual four-year part-time school and 60 per cent more than the three-year school. It is thus very easy to understand, when the number of hours taught per week is not prescribed, why the American Bar Association standards demand a four-year course of the afternoon or evening school. Seven two-year evening schools graduate their students with an average of less than thirty hours of class room work, just a fraction over the amount required to be completed by first-year students in a Class A full-time institution.

Of the 199 law schools, there are 83 full-time schools, 80 of which have three-year courses and 3 shorter courses. The other schools are all either in the classification of mixed,—that is full-time and part-time sessions,—or part-time. The mixed schools all require three years' work to complete their full-time sessions, and 17 of them require four years for their part-time sessions, while the other 6 only require three years for the afternoon or evening classes. The part-time or afternoon or evening schools are divided as follows:

Number of Schools	Years Required for Graduation
2	1
7	2
32	3
5	Afternoon, 3 years; Evening, 4
43	4
1	4½
3	5

In addition to the LL.B. degree, 9 evening schools confer an LL.M., 4 a J.D., and one a J.S.D.

1. The figures are based on the average of 70 full-time schools and 48 part-time schools (afternoon or evening courses only) which gave fairly complete returns. Mixed schools, that is, those having both morning and afternoon or evening sessions, are not here included.
2. Twenty-one full-time schools have more than three part-time teachers.
3. Thirteen part-time schools have one or more full-time teachers.

While the average total attendance for the full-time approved school last year was 175, slightly more than in the previous year, the evening school attendance declined slightly to 148.

The comparative resources of the two groups of institutions are shown by the fact that about half of the part-time schools had an income of less than $10,000, while only five of the full-time approved schools were in this category and a majority of them were above the $25,000 class.

Four out of five of our first class of schools use the case system of teaching, as against one-sixth of the part-time schools which place principal reliance on this. An equal number of evening schools (8) resort to a combination of case and text and this figure also applies to those using a text-lecture combination, while about twice as many (17) are reported as employing cases, texts and lectures. A half dozen use the pure text method or combination of case and lecture.

Scholarship standards at the afternoon and evening schools are much lower than those of the morning school. The questionnaires show this in the following manner:

STUDENTS REQUIRED TO LEAVE SCHOOL ON ACCOUNT OF DEFICIENT SCHOLARSHIP

	0	Less than 5% of total enrollment	5% to 10%	10% to 15%	15% to 20%	over 20%
Full time approved schools	1	14	19	8	1	
Part time, i.e., afternoon or evening schools	21	8	6	1	1	3

Five part-time schools, it is alleged, pay commissions to solicitors, students, or other persons who bring in or cause the enrollment of new students.

On the average, 60% of those who enter the full-time approved school graduate, while this drops to 42% of the matriculants in the part-time school.

Some interesting information was called for by the question asking for an estimate of the percentage of graduates of the school remaining in practice after five years. The deans of the full-time approved schools estimated this figure on the average at 78 percent, while the average of the replies of the heads of the unapproved afternoon and evening schools was 54 percent.

There are today a total of 33 part-time and mixed law schools which neither require any college education for entrance nor a full four-year evening course as required by the A.B.A. standards. The names of these schools and their distribution in the different states is as follows:

Alabama—1. Jones Law School, Montgomery, 3-year evening course, attendance 90.

Arkansas—1. Arkansas Law School, Little Rock, 2-year evening course, attendance 75.

California—1. Balboa Law College, San Diego, 3-year evening course, attendance 65.

District of Columbia—4. K. of C., Columbus University, School of Law, Washington, 3-year evening course, attendance 465; National University Law School, Washington, 3-year evening course, attendance 712; Washington College of Law, Washington, 3-year afternoon course, attendance 291; Y. M. C. A., Southeastern University, School of Law, Washington, 3-year afternoon and evening course, attendance 286.

Georgia—4. Southern Law School, Athens, 2-year afternoon and evening course; Atlanta Law School, Atlanta, 2-year evening course; Woodrow Wilson College of Law, Atlanta, 2-year afternoon course, attendance 45. Winder Law School, Winder, 2-year afternoon and evening course.

Indiana—3. Benjamin Harrison Law School, Indianapolis, 3-year evening course, attendance 264; Lincoln College of Indiana, Dep't of Law, Indianapolis, 3-year evening course, attendance 31; South Bend University Law School, South Bend, 3-year evening course, attendance 14.

Kentucky—2. Jefferson School of Law, Louisville, 2-year evening course, attendance 159; The Central Law School (colored), Louisville, 3-year afternoon course, attendance 15.

Maine—1. Peabody Law Classes, Portland, 3-year early morning school, attendance 49.

Maryland—1. University of Baltimore, School of Law, Baltimore, 3-year evening school, attendance 380.

Mississippi—1. Jackson School of Law, Jackson, 2-year evening school, attendance 32.

North Carolina—1. Wilmington Law School, Wilmington, 3-year evening course, attendance 14.

Tennessee—6. Chattanooga College of Law, Chattanooga, 3-year evening course, attendance 95; John Randolph Neal College of Law, Knoxville, 1-year afternoon and evening course, attendance 112; University of Memphis Law School, Memphis, 3-year evening course, attendance 139; Andrew Jackson University School of Law, Nashville, 3-year evening course, attendance 96; Kent College of Law, Nashville, 3-year evening course, attendance 14; Nashville Y. M. C. A. Night Law School, Nashville, 3-year evening course, attendance 102.

Texas—6. Jefferson University, School of Law, Dallas, 3-year evening course; North Texas School of Law, Fort Worth, 3-year evening course, attendance 45; Houston Law School, Houston, 3-year evening course, attendance 255; Texas College of Law, Houston, 3-year evening course, attendance 3; Houston Law School, Huntsville Branch, Huntsville, 3-year evening course, attendance 20; San Antonio Public School of Law, San Antonio, 3-year evening course, attendance 154.

Virginia—1. Norfolk College, School of Law, Norfolk, 2-year evening course, attendance 21.

Until something is done either to improve these schools, or eliminate them, there seems little hope of attaining the goal of a better bar in this country.

Criminal Law Enforcement in Our Cities

(*Continued from page* 534)

gressional consent, for the purpose of overcoming the obstacles of territorial jurisdiction in the administration of criminal law?

Yes in one state.

9. Arousing the Bar

a. By what means can the bar in your community be awakened to its responsibility to improve the administration of criminal justice?

Agitation for more organized general bar activity, 22; The bar *is* aroused, 18; Nothing or no answer, 14.

b. What if anything is being done in your community at the present time to awaken the interest of the bar in this field?

Agitation for more organized general bar activity, 21; Enlisting aid of the press, 5; No answer, 28.

10. Other Problems

a. Enumerate any other problems in the field of the administration of criminal justice which you consider more important than those above listed, such as possibly the requirement of unanimous verdicts, failure to provide for alternate jurors, the abuse of the constitutional privilege of self-incrimination, prevent spurious alibis, etc.

Respondents advancing suggestions, but with very little uniformity, 40; No suggestions, 14.

Please indicate which of these major problems is most important in your community, in the opinion of your committee, which is second in importance and which is the third in importance.

7—Criminal Procedure, 22 votes; 3—Police, 20; 1—Relation between Politics and Crime, 17; 9—Arousing the Bar, 10; 2—Prosecutor, 7; 4—Lawyer Criminal, 4; 5—Racketeering, 3; 6—Kidnaping, 2; 8—Federal v. Local Administration of Criminal Justice, 2; No answer, 14.

AMERICAN BAR ASSOCIATION JOVRNAL

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JOSEPH R. TAYLOR
MANAGING EDITOR
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Chicago, Illinois

SOME MOVEMENTS THAT MOVE

The forthcoming Annual Meeting at Milwaukee will furnish many evidences of increasing momentum in the case of various worth-while movements in the legal field of today.

The movement for a better coordination of the aims and activities of the Bar of the entire country has unquestionably received a decided impetus during the past year from the concentration of effort on the National Bar Program. In fact, it may be said that the execution of those plans with such pronounced success has practically created the definite movement. For the first time in this country lawyers have worked together in a nation-wide common undertaking, each committee and each organization definitely conscious that it was part of a larger army which was moving to the attack of major objectives. This lesson in cooperation will no doubt be repeated and reinforced from year to year, until the habit of working together to achieve the larger aims of the entire Bar will ultimately be followed, as a natural consequence, by some form of organization more suited to conditions.

That ultimate aim may be far from realization as yet, but steps have certainly been taken leading definitely in that direction, and with each month of common effort the pace has been quickened. Cooperation of the lawyers of the country in some more suitable form of organization has in the past year been brought from the realm of wishful thinking to that of an acknowledged goal. And if that goal seem distant, it is well to take to heart the lesson of the victory finally achieved in the long struggle to secure congressional assent to the exercise by the United States Supreme Court of rule-making power on the law side of the Federal Courts.

That lesson is that there is never any reason for despairing of the final success of a really constructive idea. Such ideas have a vitality that enables them to survive long periods of drought and neglect. In due season they will triumph and vindicate the long struggle, if only their advocates have faith and confidence and persistence.

This prophecy of triumph applies to the whole National Bar Program. That program embraces four very important and distinct movements and each of these has been accelerated during the past year.

The movement to aid in the better enforcement of the criminal law has engaged the attention of the Bar as well as the public to an unusual degree. The definite opinions of the lawyers of the country as to what is wrong and what should be done to remedy it have been elicited by a questionnaire and in other ways. As a result the ground has been well laid for a further definite advance in this important field, and there is no doubt that the Bar and public can be relied on to cooperate better than ever before.

The movement to stop the incursions of laymen and lay agencies into the field of practice of the law has also unquestionably scored great gains and made distinct advances since the Association last met. No subject on the National Bar Program has aroused greater interest than this. There was a series of scattered movements of this kind in nearly all of the States before the American Bar Association raised the protection of the public and the profession from such agencies into one of the major subjects deserving the attention and action of the entire Bar. That the Bar is further along towards the goal is shown, not only by the activities of the committees and associations in the various States and larger cities, but by the important results obtained in the form of court decisions involving the question of unlawful practice. The latest of these is noted in this issue and is that of the Missouri Supreme Court ordering certain trust companies of St. Louis to desist from activities held to constitute unlawful practice.

The movement for a better judiciary, which involves of course the most desirable

method of selection, continues to show vitality and to engage the attention of the Bar. Replies to the questionnaire sent out in connection with the National Bar Program show a definite desire on the part of lawyers living in States where the judges are elected, for some changes in that system. Whatever conclusions are arrived at by the Bar as to this particularly important question—in which of course local conditions must be taken largely into account—there can be no doubt that progress has been made.

The same applies to the movement to secure better standards of legal education and admission to the Bar, which is steadily pushing forward and which, from time to time, adds new territory to that already won.

A like gathering momentum is even more plainly discernible in the case of the movement for the integration of the Bar. A long period of education has been necessary to bring out clearly the main advantages of such a plan. And even when those advantages have been fairly well recognized, either legislative indifference or legislative opposition has barred the way. But of late the movement, on encountering this obstruction in some States, has shown an ability to flow around it, as a river around a rock, in the deep channels cut by the exercise by the courts of the power over their officers in respect to discipline of attorneys and the establishment of standards for admission to the Bar. It remains to be seen how far this method will permit the Bar to secure the full advantages of Bar integration. But certainly two of the main ends have been secured most expeditiously in at least two important States by this simple method.

Paralleling this movement has been a growing tendency of the judiciary of the higher courts of the land to make full use of their powers to expedite the administration of justice. The orders of the Supreme Courts of Illinois and Missouri in respect to the discipline of attorneys and Bar admissions, as well as their recent uncompromising utterances against the illegal practice of law by corporations and laymen, are manifestations of this growing tendency of courts to use their constitutional powers boldly to discharge their constitutional duties. Witness also the action of the Oklahoma Supreme Court in calling to its aid for the clearing of the congested appeal docket judges of the District Courts by appointing them as Supreme Court Commissioners, and the proposal now under consideration to enlist a very large number of the ablest and most experienced members of the Oklahoma Bar by like appointment. In a few happy jurisdictions the courts have preserved, unvexed by legislative invasion, the ancient rule-making power. In other jurisdictions where this power has been usurped by legislative action, it has been restored in whole or in part. In those jurisdictions where the legislature still refuses to restore to the courts the power to regulate methods of procedure there is increasing recognition on the part of lawyers and judges of the fact that the constitutional grant to the Judicial Department of all judicial power embraces the power to determine the manner in which that power shall be exercised.

The line of further advance is clear. The oft-expressed dissatisfaction with the administration of justice, whether in the civil or the criminal courts, springs in great measure from the methods of procedure employed in those courts. This dissatisfaction, with its consequent lack of confidence in the courts and its officers, cannot be allayed without a thoroughgoing revision of procedure. It has therefore been suggested that means for securing more efficient court procedure in civil and criminal cases by the exercise of the rule-making power, as well as by constitutional and statutory amendment, be added to the National Bar Program for the ensuing year. The suggestion merits serious and sympathetic consideration.

In whatever direction we look in the legal field we see these evidences of growing power and purpose and of genuine progress. There has been no retrogression. The Bar is today more alive to its duties and responsibilities than ever before. And all along the line the tempo is quickened and the feeling is more assured.

THE MILWAUKEE MEETING

Arrangements are all complete for the meeting of the Association at Milwaukee. Those who attend are assured of a program at once interesting and instructive, a hospitality which cannot be excelled and a great variety of entertainments.

The program emphasizes the national aims of the profession. Three of the main sessions will be principally devoted to subjects on the National Bar Program. Addresses by distinguished speakers will deal with other subjects of general interest to the profession.

REVIEW OF RECENT SUPREME COURT DECISIONS

Equal Protection Clause Does not Prevent Municipality Which Is Selling Electric Power to Consumers from Imposing Annual License Tax on Competing Private Utility Corporation—National Banks May Give General Lien on Assets to Secure State Deposits Where State Law Permits State Banks to Do So—Equal Protection Clause as Applied to Determination of Amount of Property Tax on Net Receipts of Foreign Insurance Corporation—Exemption of Foreign Casualty Insurance Companies from Tax on Net Receipts Derived from Local Business, While Similar Receipts of Foreign Fire Insurance Companies Are Subject to Tax, Held Unconstitutional—Power of Interstate Commerce Commission to Authorize Lease of Interstate Carrier under 1933 Emergency Transportation Act—Status of War Risk Insurance Policies Under Fifth Amendment

By Edgar Bronson Tolman*

Taxation—License Taxes—Equal Protection of Laws

Where a municipality and a private corporation are both engaged in the business of selling electric power to consumers, and are in active competition with each other in such business, the equal protection clause of the Fourteenth Amendment does not prohibit the municipality from imposing on the private corporation an annual license tax based on gross income, even though the municipality is not subject to the burden of the tax.

Puget Sound Power and Light Co. v. City of Seattle, Adv. Op. Vol. 78, p. 664; Sup. Ct. Rep. Vol. 54, p. 542.

This case related to the validity of a municipal license or excise tax, challenged by the appellant, Puget Sound Power and Light Company, as infringing the Fourteenth Amendment and the contract clause of the Federal Constitution. The validity of the tax was sustained by the Supreme Court of Washington, and on appeal its ruling was affirmed by the Supreme Court in an opinion by Mr. Justice Stone.

The appellee, City of Seattle, by ordinance of May 23, 1932, imposed an annual license tax on the privilege of carrying on the business of selling or furnishing electric light and power to consumers. The tax is 3% of the gross income from the business "in the city" during the fiscal year preceding the tax year for which the license is required. The appellant sued to recover an installment of the tax previously paid and to enjoin further collection. The state courts decided in favor of the city on its demurrer to the appellant's complaint.

The appellant, a Massachusetts corporation, acting under a municipal franchise, and the City are engaged in the electric light and power business, and actively compete with each other. Under state law the city fixes its own rates, and they are not subject to regulation by the Public Service Commission, as are those of the appellant. City revenues, derived from its electric business, are required by the city charter to be deposited in a special "city light fund," separate from the general funds of the city, and transfer from one fund to the other, except by direction of the city council, is forbidden by the charter. The ordinance in question imposes, in terms, the same tax on the city "so far as permitted by law," as that laid on the appellant. The city, however, had issued bonds, prior to the taxing ordinance, payment of which is secured by the revenues of its electric business, and appellant claimed that the pledge of the revenues is superior to all other charges and that the city cannot pay the tax. Moreover, it has not paid it nor made any provision for paying it. But in view of the contentions of the appellant and the grounds on which the case was decided, it was found unnecessary to determine the precise status of the pledge of revenues, for the appellant urged that even though the tax were paid by the city to itself it would impose no actual burden.

The principal question decided was whether the tax violates constitutional limitations because it is levied on a business with which the taxing sovereign is actively competing. Stating the question involved, Mr. Justice Stone said:

> There is no contention that appellant's franchise or any contract relieves it generally from the duty of paying taxes. It is not contended that a state or municipality, merely because it fails or is unable to tax its own property or business, is prohibited from taxing like property or business. The contention here is that constitutional limitations are transgressed only because the tax affects a business with which the taxing sovereign is actively competing. For that reason it is argued that the taxation involves a forbidden discrimination and deprives appellant of its property without due process since the combined power of the city to tax and to compete may be used to destroy appellant's business. As appellant asserts that the tax can impose no effective burden on the city, its contention is, in effect, that the city, by virtue of the Fourteenth Amendment, upon entering the business forfeited its power to tax any competitor.

In deciding this question the Court found it unnecessary to go further than to point out that the equal protection clause does not forbid discrimination in taxation with respect to things that are different, and that there are many and obvious differences between the taxing sovereign and its taxpayers. Discussing the effect of the equal protection clause in relation to the case, Mr. Justice Stone said:

> We need not stop to inquire whether the equal protection clause was designed to protect the citizen from advantages retained by the sovereign, or to point out the extraordinary implications of appellant's argument when applied to expansions of government activities which have

*Assisted by James L. Homire.

become commonplace. It is enough for present purposes that the equal protection clause does not forbid discrimination with respect to things that are different. The distinctions between the taxing sovereign and its taxpayers are many and obvious. The private corporation, whatever its public duties, carries on its business for private profit and is subject to the obligation, common to all, to contribute to the expense of government by paying taxes. The municipality, which is enabled to function only because it is a tax gatherer, may acquire property or conduct a business in the interest of the public welfare, and its gains if any must be used for public ends. Hence equal protection does not require a city to abstain from taxing the business of a corporation organized for profit merely because in the public interest the municipality has acquired like property or conducts a like business.

These differences are not lessened nor the constitutional exaction of uniformity increased because the city competes with a business which it taxes. . . . The state may tax different types of taxpayers differently even though they compete. . . . It could not plausibly be argued that a private nonprofit corporation distributing electric current to consumers at cost could not be exempted from taxes borne by others serving the same wants. . . . A business which in private hands might be exempted from taxation because not conducted for private profit is no less privileged because its capital is supplied by the government which controls it in the public interest. These considerations are in no way affected by calling the city's activity "proprietary" instead of "governmental."

The injury, which appellant fears may result, is the consequence of competition by the city, and not necessarily of the imposition of the tax. Even without the tax the possibility of injury would remain, for the city is not bound to conduct the business at a profit. The argument that some way must be found to interpret the due process clause so as to preclude the danger of such an injury fails to point the way. Legislation may protect from the consequences of competition, but the Constitution does not. . . . The Fourteenth Amendment does not purport to protect property from every injurious or oppressive action by a state . . . nor can it relieve property of congenital defects. . . . It does not preclude competition, however drastic, between private enterprises or prevent unequal taxation of competitors who are different. Those were risks which appellant took when it entered the field. No articulate principle is suggested calling for the conclusion that the appellant is not subject to the same risks because the competing business is carried on by the state in the exercise of a power which has been constitutionally reserved to it from the beginning.

The appellant contended also that the tax will operate to destroy the contract license which it holds under its franchise. In answer to this the Court pointed out that the appellant took the franchise subject to the state's power to tax the privilege in common with all other privileges and property.

MR. JUSTICE VAN DEVANTER delivered a specially concurring opinion in which MR. JUSTICE MCREYNOLDS, MR. JUSTICE SUTHERLAND and MR. JUSTICE BUTLER concurred. In this opinion MR. JUSTICE VAN DEVANTER expressed his concurrence in the judgment of affirmance, but not in the principal part of the Court's opinion. The concurring opinion, though apparently assuming that equal treatment must be accorded both businesses, agreed that the appellant's contention under the equal protection clause could not be sustained. In this connection analysis of the case suggested three possible views as to the effect of the city's pledge of revenues from its electric business, none of which afforded a basis for the charge of unreasonable discrimination. The three possible interpretations of the pledge and the reasons for concluding that the ordinance was not unreasonably discriminatory are summarized in the following portion of the opinion:

> In view of the terms of the ordinance, and of the city's attitude declared by its counsel, it is manifest that, if the pledge be only of the net revenues, the tax falls on the city's business just as on the other, and that the charge of unreasonable discrimination is without any basis.
>
> If the pledge be of the gross revenues but subject to payment therefrom of any tax lawfully laid on the city's business, thereby leaving the city free to pay the tax imposed by the ordinance out of such revenues, it still is manifest that the ordinance treats both businesses alike, and therefore that there is no discrimination.
>
> If the pledge be of the entire gross revenues and, by reason of the contract clause of the Constitution, prevents the application of part of the revenues to the payment of the tax, it is very plain that such discrimination as results is neither arbitrary on the part of the city nor within the condemnation of the equal protection clause. The contract clause and the equal protection clause are both parts of the Constitution; and of course action taken or omitted in obedience to the contract clause cannot be regarded as a violation of the equal protection clause. Nor does the latter clause require that a right or exemption which under the other clause must be accorded to a particular business be also accorded to a similar business not otherwise entitled to it.
>
> It follows that in none of the suggested views of the pledge can the appellant's charge of unreasonable discrimination be sustained. And, this being so, there is no need for now considering which of the suggested views of the pledge is right.

The case was argued by Mr. Clarence R. Innis for the appellant and by Messrs. Walter L. Baumgartner and A. C. Van Soelen for appellee.

National Banks—Lien on Assets to Secure Deposits of a State

Under the Act of June 25, 1930, national banks have power to give security for deposits of a state of the same kind that state banking institutions may give for such purpose. Where the state law permits state banks to give a general lien on its assets to secure state deposits a national bank may give a similar lien on its assets to secure state deposits.

Lewis v. Fidelity & Deposit Company of Maryland, Adv. Op. Vol. 78, p. 990; Sup. Ct. Rep. Vol. 54, p. 848.

This opinion dealt with questions as to the validity of a lien on assets of a national bank to secure state deposits. Under Georgia statutes, in force since 1879, a bank, state or national, may be a depository of state funds, upon giving a faithful performance bond. The bond with surety creates a lien on all the bank's assets, both those held at the time of execution of the bond and those subsequently acquired.

In 1928 The Hancock National Bank of Sparta was appointed State depository for 4 years, and gave bond with the Fidelity and Deposit Company of Maryland as surety in the sum of $10,000. Thereafter until May 23, 1932, tax collections from Hancock County were deposited in that bank. On that day the bank was declared insolvent, and a receiver was appointed. At that time the state funds on deposit amounted to $6,157.41. This sum the surety paid and took an assignment of rights arising out of the deposit. It then sued the receiver in a federal court in equity to enforce a lien for the amount on all assets in the receiver's hands, claiming priority according to the date of the bond.

The District Court held that neither the State nor the company was entitled to a lien or preferential treatment, and allowed merely a *pro rata* dividend. The Circuit Court of Appeals reversed the judgment, holding that the asserted lien was valid and entitled to priority. On certiorari this was affirmed by the Supreme Court, in an opinion by Mr. Justice Brandeis. He first called attention to the recent rulings in *Texas & Pacific Ry. Co. v. Pottorff*, 291 U. S. 245, and *City of Marion v. Sneeden*, 291 U. S. 262, that national banks, prior to the Act of June 25, 1930, had no power to pledge assets to secure deposits except federal deposits

as provided by statute. In view of those rulings, he added that the judgment could not be affirmed unless the Act of 1930 authorizes a national bank to give as security a general lien of the character prescribed by the state statutes. However, an examination of that Act led to the conclusion that it does authorize such lien.

The Act of 1930 provides:

> "Any association may, upon the deposit with it of public money of a State or any political subdivision thereof, give security for the safe-keeping and prompt payment of the money so deposited of the same kind as is authorized by the law of the State in which such association is located in the case of other banking institutions in the State."

The receiver's contention was that that Act authorizes merely the pledge of specific assets to secure public deposits. But its broad terms and its purpose to equalize the position of national and state banks were thought to require a different construction. As to this, MR. JUSTICE BRANDEIS said:

> The language of the Act is broad enough to authorize giving a general lien on present and future assets, wherever banks organized under the laws of the State have such power; and it should be given that construction. For the main purpose of the 1930 Act was to equalize the position of national and state banks; and without such power national banks would not in Georgia be upon an equality with state banks in competing for deposits. The policy of equalization was adopted in the National Bank Act of 1864, and has ever since been applied, in the provision concerning taxation. In amendments to that Act and in the Federal Reserve Act and amendments thereto the policy is expressed in provisions conferring power to establish branches; in those conferring power to act as fiduciary; in those concerning interest on deposits; and in those concerning capitalization. It appears also to have been of some influence in securing the grant in 1913 of the power to loan on mortgage.

The receiver urged also that, even if the Act of 1930 authorized the giving of a general lien, the lien asserted here must fail because certain provisions of the Georgia law are inconsistent with the National Bank Act, and because obligations are imposed on state depositories with which no national banks may comply. In support of this contention the receiver pointed to the terms of the statutory bond which is conditioned "for the faithful performance of all such duties as shall be required" of the depository "By the General Assembly or the laws of this State," and argued that as a national bank is an instrumentality of the United States, it cannot by contract subject itself to the laws of a State. In answer to this the Court, pointing out that, in many respects, national banks are subject to state laws, said:

> But a national bank is subject to state law unless that law interferes with the purposes of its creation, or destroys its efficiency, or is in conflict with some paramount federal law. . . What obligations to the State the bank assumes may be defined by the law of that State. It is quite possible that the legislature might attempt to impose, under the conditions of the bond, a duty which the bank would be without authority to undertake; and to that extent the contract would be unenforceable. But it is not shown that the obligations as now defined by the courts of Georgia are contrary to anything in the National Bank Act. Moreover, the state court, which would be the controlling authority on the question, might decide that the failure of part of the consideration to be given would not invalidate the appointment.

In further support of the contention that the asserted lien must fail because of inconsistencies between Georgia law and the National Bank Act, the receiver urged that the lien attaches to all kinds of property from the date of the bond, and is not defeated even by a *bona fide* sale in the ordinary course of business. These and other features of the lien were urged as insuperable obstacles to the carrying out of the purpose of the bank. The Court, however, found no reason for holding erroneous the conclusions of the Court of Appeals, as to the effect of the lien under the state law, and said:

> The lower court took judicial notice of the fact that for more than half a century the general lien described has been in force, and has not interfered with the performance by banks of their duties to the public; and that national banks while serving as depositories have not, so far as appears, ever been confronted with a conflict between their duties to the State and to the United States. The reasons given by that court for its conclusions as to the operation and effect of the lien under the law of Georgia are set forth fully and persuasively in the opinion of the Circuit Court of Appeals. We cannot say that it erred in the conclusions reached either as to the state law, or as to the facts.

The receiver urged further that the lien, if limited in its operation on commercial assets to such moneys and commercial paper as are captured by a receivership is not true security at all, but would, in the event of insolvency, be a preference in conflict with the policy of the National Bank Act as expressed in §50. To this the Court answered that the Act does not prohibit liens given prior to insolvency and not in contemplation thereof.

> Sections 50 and 52 do not prohibit liens given prior to insolvency and not in contemplation thereof, whether they arise from express agreements, or are implied from the nature of the dealings between parties, or arise by operation of law. . . The lien here asserted arises out of an agreement executed at a time when there was no question of insolvency; nor is it restricted in its operation to the event of insolvency. It may be exercised by execution or otherwise whenever the bank refuses to pay. It resembles the lien which is enforced when seizure is made by the creditor within four months of bankruptcy, of property claimed under an after-acquired property clause of a mortgage. . . It resembles also those cases where, under the common law of distress or under a statutory lien, described by the courts as "inchoate" or "dormant," a landlord, within four months of bankruptcy, seizing or levying upon whatever property was on the tenant's premises, was held to have a valid lien.

In conclusion, the Court gave consideration to the contention that in any event the Act of 1930 creates no general lien here, because the bond antedated the statute. This argument was rejected, also. In this connection it was observed that the balance on deposit when the Act of 1930 was passed was withdrawn shortly thereafter and that deposits and withdrawals from then until the receivership were made in large amounts, and that all moneys on deposit at the time of receivership had been deposited after the passage of the Act. Moreover, the course of dealings between the parties, as reflecting their intention, was emphasized.

> The appointment of the bank as depository in 1928 and the bond were to cover a period of four years. Though the lien was in form security for the bond, the extent of liability was to be measured by the unpaid balance. Thus, the transaction was not completed in 1928; it was contemplated that there would be continuous dealings between the parties for four years. In fact, the relation continued until the appointment of the receiver. Throughout the whole period the parties intended that the lien should be operative and supposed that it was. The appointment was within the power of the State to confer and of the bank to accept, but by reason of the paramount federal law one of the anticipated incidents of the relation, the lien, could not arise. When that obstacle was removed by the Act of June 25, 1930, the original agreement could as to the future be given the effect intended by the parties; and the lien became operative as to deposits thereafter made and is entitled to priority from the date of the Act. A statute is not retroactive merely because it draws upon antecedent facts for its operation. . . It was not necessary to go through the form of executing a new bond.

The case was argued by Messrs. Wallace Miller and George P. Barse for the petitioner, and by Mr. M. F. Golastein for the respondent.

Taxation—Uniformity Under Equal Protection Clause

In determining the amount of a tax on net receipts, which is treated as a property tax, the equal protection clause of the Fourteenth Amendment requires that the receipts must be scaled down or debased in like manner as other property when assessed for taxation.

Under the equal protection clause, the net receipts of foreign fire insurance companies derived from their local casualty insurance business may not be taxed, while the net receipts of foreign casualty insurance companies derived from their local casualty insurance business are not subject to the same or any equivalent tax.

Concordia Fire Ins. Co. v. Illinois, Adv. Op. Vol. 78, p. 1006; Sup. Ct. Rep. Vol. 54, p. 830.

This case came before the Court on appeal from a judgment of the Supreme Court of Illinois, growing out of a controversy as to the amount of taxes due from the appellant (defendant in the trial court), a fire insurance corporation, organized in Wisconsin. The State brought suit to recover amounts alleged to be due for the fiscal years ending April 30, in the years 1923 to 1927. The court of first instance found for the defendant and gave judgment accordingly. On appeal the Illinois Supreme Court disapproved the judgment, and entered judgment awarding the State recovery of smaller amounts of taxes than it claimed for the years 1923-1926, and the full tax claimed for 1927. On further appeal the Supreme Court reversed the judgment on the ground that the tax for 1927 operated as a denial of equal protection of the laws. The tax for that year was held bad for two reasons, first, that it was unreasonably discriminatory to the extent that it was laid on net receipts from casualty insurance (since foreign casualty insurance companies are not subject to such a tax), and second, that the net receipts were not debased or scaled down as was done with other property.

The defendant is licensed in Illinois to engage in the business of insuring against fire, marine and inland navigation and various casualty risks. Its receipts consisted only of premiums on policies. The taxes in question are levied under §30 of a statute of 1869 which provides as to foreign corporations that annually, in May, "the amount of their net receipts" of local agencies shall be entered on the local tax lists and be "subject to the same rate of taxation for all purposes, state, county, town and municipal, that other personal property is subject to at the place where located."

During 1923-1927, and earlier, the uniform practice of the taxing authorities had been to assess personal property at 60% of "fair cash value" as the "full value," and in the years 1923-1926, under an act of 1919, they treated one-half of this "full value" as the "assessed value." The result was that 30% of fair cash value of personal property was the basis for taxation. The same processes were applied to real property. In 1927 the statute directing that the assessed value be taken as 50% of the "full value" was repealed but 60% of cash value continued to be treated as full value.

For the years 1923-1926 the defendant made returns of net receipts from fire, marine and inland navigation insurance, and the amounts so returned were accepted as correct, but were not scaled down to 60% or further reduced as was done in the assessment of other property.

In 1927 the company made a return of net receipts of $76,291 from the same classes of business. This was arrived at by deducting operating expenses from gross receipts, such expenses being treated as 54% of the gross receipts. On this basis gross receipts were $165,850.

The company was later cited to a hearing by the board of review with respect to the taxes for all the years. At this hearing it had opportunity to support and supplement its returns with further evidence, but it elected to stand on the returns and made no further showing. It conceded that the returns included no receipts from casualty insurance.

The board fixed the net receipts for 1927 at $121,550 instead of $76,291, and, without scaling down or debasing the amount so fixed, it listed the sum so fixed as the assessed value. This amount was fixed because receipts from casualty insurance had been omitted from the return, and because operating expenses deducted from gross receipts were regarded as excessive. The Supreme Court of Illinois had previously ruled, in *Hanover Fire Ins. Co. v. Harding*, 327 Ill. 590, that in applying §30 of the Act of 1869 the reductions by scaling and debasement, applied in assessing other personal property, should be applied to the net receipts of foreign insurance corporations.

Dealing with the 1923-1926 assessments, the Illinois Supreme Court directed judgment for taxes based on receipts scaled down and debased as other personal property. But it sustained the tax for 1927 despite the fact that there had been no scaling down of the net receipts to 60% of their value, as was done to other personal property. In this respect its ruling was found to be a denial of equal protection. As to this, MR. JUSTICE VAN DEVANTER said:

> It is said that the act as it was applied to the net receipts of 1927 subjects the personal property of a foreign fire insurance corporation to a tax based on its full actual value whereas other personal property is taxed on a basis of 60% of its value. The complaint is not that the net receipts were valued excessively, but that the value when determined was not debased like that of other personal property. The tax, as extended on the full actual value fixed by the board of review, was $5,895.19. Had that value been debased to 60%, as was the value of other personal property, the tax would have been $3,537.11, making a difference of $2,358.08. The act deals specially and only with the taxation of net receipts of foreign fire, marine and inland navigation insurance corporations. The assessing officers acted in virtue of it and the state court held their action was valid under it. Thus both applied it, and they applied it as subjecting the net receipts of a foreign fire insurance company, by reason of being such, to a tax burden 40% greater than that laid on other personal property. No reasonable basis for such a discrimination is suggested and none is perceived. It is essentially the same character of arbitrary and prejudicial discrimination that was condemned as a denial of the equal protection of the laws in *Hanover Fire Insurance Co. v. Harding*, 272 U. S. 404.
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> Whether a state statute is valid or invalid under the equal protection clause of the Fourteenth Amendment often depends on how the statute is construed and applied. It may be valid when given a particular application and invalid when given another. Here the application which was made of §30 in respect of the taxation of the net receipts of 1927, i. e., the application made by the assessing officers and sustained by the Supreme Court, brought the section into conflict with the prohibition of that clause. This means that as so applied it is invalid, notwithstanding its validity in some different applications.

Section 30, as construed and applied, was found unreasonably discriminatory on the further ground that foreign fire insurance companies are required to pay a tax on their receipts from casualty insurance as well as on receipts from fire, marine and inland navigation insurance, whereas foreign casualty insurance companies pay no such tax nor the equivalent thereof. Dealing with this objection to the tax, MR. JUSTICE VAN DEVANTER said:

> The factual premises of this claim are stipulated. The Supreme Court of the State has construed §30 as taxing

the foreign fire insurance companies on their net receipts from casualty insurance, and has held that foreign casualty insurance companies conducting a casualty insurance business are not taxable on their net receipts under §30 or any other statute. The stipulation shows that all of these foreign corporations are lawfully entitled by reason of licenses, etc., to conduct their respective businesses within the State; that the casualty corporations are conducting the "same character" of casualty insurance business as the fire insurance corporations; that these businesses are competitive; and that the casualty corporations are taxed on such real and tangible personal property as they hold within the State, while the fire insurance companies are taxed not only on their real and tangible personal property but also on their net receipts from casualty insurance.

This statement shows that §30, as the state court construes and applies it, works a very real and prejudicial discrimination against the fire insurance companies and in favor of the casualty companies in respect of competitive casualty businesses of the same character, conducted in the same way and in the same territory. The companies are all foreign corporations, and all are for present purposes equally within the jurisdiction of the State and subject to her power to tax. There is no basis or reason for making a distinction between them that has any pertinence to the imposition of a property tax such as is in question. The net receipts which are taxed are not different from those which are not taxed; and both come from the same source. Such a discrimination in respect of the taxation of real or tangible personal property obviously would be essentially arbitrary. In principle it is not different with the net receipts. They are property and the tax which §30 imposes is, as the state court holds, a property tax. It follows that the section, when construed and applied in the way just described, is in conflict with the equal protection clause of the Constitution. Full support for this conclusion is found in prior decisions.

MR. JUSTICE CARDOZO delivered a dissenting opinion expressing his dissent from the opinion of the Court to the extent that it holds that the tax on net receipts of premiums on casualty insurance is a denial of the equal protection of the laws. In this opinion he pointed out that previous litigation respecting the tax had merely decided that a denial of the debasement to foreign corporations produced an inequality so gross in comparison with the burdens of domestic corporations as to vitiate the tax and the statute imposing it; that to this extent the tax was treated as a property tax, although it is a tax on net receipts, on the operations of the business, rather than a true property tax.

In this view the question remained as to what kind of classification is permissible when the net receipts are the subject of the tax and the measure of its burden. The mere fact that the business of the fire insurance companies in some measure overlaps the business of casualty insurance companies was thought no ground for holding that the former cannot be taxed on a different basis from the latter. In this connection a comparison of the casualty business of the two classes of companies was made, showing that the volume of casualty business of fire insurance companies is much smaller than the same class of business done by casualty companies. Discussing this comparison and the general basis of classification for taxation, MR. JUSTICE CARDOZO said:

> This comparison makes it clear that the business of fire insurance companies as carried on in Illinois is essentially a different one from the business generally known as that of casualty insurance, though the spheres coincide for the space of a small segment. A phase or department of one business may be akin to a phase or department of another, and still the kindred branches may bear unequal taxes. Coincidence of some of the parts is not enough unless the parts are so many as to determine the identity of the whole. The vice of any different principle may be known from its consequences. The drug store of today supplies many things besides medicines and surgical appliances. It has a counter where sandwiches and salads and ice cream and many other edibles are furnished to its customers. If a tax were to be laid upon the earnings of a drug store, the acceptance of the appellant's argument would drive us to a holding that the receipts from the sale of edibles must be excluded from the reckoning in the absence of a like tax upon the proprietors of restaurants. Dealers of ready-made clothing have a department of their business in which clothes are made to order. The appellant would have us say that the earnings from that department are exempt under the constitution from a tax upon receipts unless a like tax is laid upon the earnings of the merchant tailor. The legislature in that view may no longer classify the forms of business with an eye to a composite group of uniformities and differences. There must be a segregation of forms of business into their constituent activities, which, to the extent that there is identity, must be taxed for any one group as they are taxed for any other. Immunity from tax laws of unequal operation has never until now been pressed to that extreme. . . .
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> By the very law of their being, companies whose principal business is to provide insurance against fire, but who provide casualty insurance in a very narrow field, are in a class of their own, with capacities and opportunities essentially diverse from those of companies who are incompetent to provide insurance against fire, but who do insure against almost every other imaginable risk. The state is not called upon to explain the reasons for taxing the members of the one class more heavily than it does the members of the other. The burden is on the appellant who would strike the statute down, and not on the state which invokes the presumption of validity. . . . "As underlying questions of fact may condition the constitutionaliy of legislation of this character, the presumption of constitutionality must prevail in the absence of some factual foundation of record for overthrowing the statute. . ." Here the foundation fails, and with it the assault.

In conclusion the opinion states that when fire insurance companies availed themselves of the privilege of writing other forms of insurance they did so with notice that their net earnings from all sources would be subject to the tax.

> For many years the fire insurance companies in Illinois were without power to write a policy unless the hazards were those of fire or of inland navigation. When the power was conferred upon them to cover risks of other kinds, a statute gave them notice that they must pay taxes to the county upon the net earnings of their business from whatever source derived. They were free to use the new privilege or to reject it as they pleased. They accepted it *cum onerere* if they accepted it at all.

MR. JUSTICE BRANDEIS and MR. JUSTICE STONE concurred with MR. JUSTICE CARDOZO. The CHIEF JUSTICE took no part in the decision in this case.

The case was argued by Mr. George Wharton Pepper for the appellant, and by Mr. Hiram T. Gilbert for the State of Illinois.

Interstate Commerce—Power of Interstate Commerce Commission to Authorize Lease of Interstate Carrier—Effect of State Laws

Under the Emergency Railroad Transportation Act, 1933, the Interstate Commerce Commission has power to authorize a carrier subject to that Act to lease its railroad to another such carrier on such terms as are found by it to be just and reasonable and to promote the public interest. The exercise of such power is not subject to the limitations of state laws requiring the lessor company to maintain its general offices and shops in the state of its incorporation. In furtherance of the purpose of Congress to provide an adequate national transportation service the Commission has power to approve and authorize a lease permitting the removal of such general offices and shops from the state of the lessor's incorporation, where such removal is found by the Commission to be in the interest of economy and efficiency of interstate operations.

Texas, et al, v. United State, et al., Adv. Op. Vol. 78, p. 983; Sup. Ct. Rep. Vol. 54, p. 819.

This case related to the validity of an order of the Interstate Commerce Commission, which approved a

railroad lease providing, among other things, that the lessee should be under no obligation to maintain certain offices, shops and roundhouses at any particular place, but should have the right to change their locations. The lessor company, Texarkana & Fort Smith Railway Company, is a Texas corporation, and the lessee, Kansas City Southern Railway Company is a Missouri corporation. The sole point in controversy was with respect to the Commission's authority to approve a lease which permits the lessee to abandon, or to remove from the State, the general offices, shops, etc., of the lessor.

The statutes of Texas confine to Texas corporations the right to "own and maintain any railways" within the State; require every railroad corporation chartered by the State to "keep and maintain permanently its general offices within this State at the place named in its charter;" and prohibit any railroad company from changing "the location of its general offices, machine shops or roundhouses, save with the consent and approval of the Railroad Commission" of Texas.

The Interstate Commerce Commission first held that the provision of the lease permitting the change and removal of shops and offices should be eliminated as a condition of its approval of the lease. Later, after enactment of the Emergency Railroad Transportation Act, it reopened the proceeding and approved the lease with the clause as originally proposed. The Commission found that the plan proposed by the applicant under the lease would result in the saving of about $81,000 a year, and that to require expenditure of such sum by prohibiting removal or change of the offices and shops would constitute an undue burden on interstate commerce.

By suit to set aside the order, the State of Texas, the State Railroad Commission and officers and municipalities of the State raised the question as to the Interstate Commerce Commission's power to approve the lease. No question as to constitutional power was presented, but merely that of statutory construction. The specially constituted district court upheld the order and dismissed the bill of complaint. On appeal the Supreme Court affirmed the decree in an opinion by Mr. Chief Justice Hughes. In approaching the question, he called attention to the purpose of the statute as confirming and carrying forward the purpose of the Transportation Act of 1920, to eliminate waste and provide an adequate transportation service for the whole nation. With these purposes in view, the Commission's power was found adequate to approve the lease and the challenged provision thereof. In this connection MR. CHIEF JUSTICE HUGHES said:

> The criterion to be applied by the Commission in the exercise of its authority to approve such transactions—a criterion reaffirmed by the amendments of Emergency Railroad Transportation Act, 1933—is that of the controlling public interest. And that term as used in the statute is not a mere general reference to public welfare, but, as shown by the context and purpose of the Act, "has direct relation to adequacy of transportation service, to its essential conditions of economy and efficiency, and to appropriate provision and best use of transportation facilities." . .
>
> It is in the light of this criterion that we must consider the scope of the Commission's authority in relation to provisions which are intended to relieve interstate carriers from burdensome outlays. The fact that burdensome expenditures may be required by state regulations is not a barrier to their removal by dominant federal authority in the protection of interstate commerce. As we said in *Colorado v. United States*, 271 U. S. 153, 163: "Prejudice to interstate commerce may be effected in many ways. One way is by excessive expenditures from the common fund in the local interest, thereby lessening the ability of the carrier properly to serve interstate commerce." Even explicit charter provisions must yield to the paramount regulatory power of the Congress. . . Obligations assumed by the corporation under its charter of providing intrastate service are subordinate to the performance by it of its federal duty, also assumed, "efficiently to render transportation services in interstate commerce." . . In the present case, the findings of the Commission, setting forth undisputed facts, leave no doubt that the provision of the lease permitting the abandonment, or removal from the State, of general offices and shops of the lessor has direct relation to economy and efficiency in interstate operations and to the achievement of the purpose which the Congress had in view in its grant of authority.

No question was involved as to the necessity for complying with the statutory requirement that a "public office" should be maintained in Texas, since counsel for the applicant submitted that by necessary implication the lease required the maintenance of such an office.

A further question discussed in regard to the construction of the statute related to the effect of the immunity conferred by Section 5 (15) relieving carriers of "restraints or prohibitions by or imposed under authority of law, State or federal," so far as necessary to enable them to carry out an order of the Commission. Rejecting the contention that the restraints and prohibitions are limited to those falling generally in the class of anti-trust laws, the Court said:

> The view that, by reference to the context, this immunity should be regarded as limited to those "restraints or prohibitions by or imposed under authority of law" which fall within the general description of "anti-trust" legislation, is too narrow. The rule of *ejusdem generis* is applied as an aid in ascertaining the intention of the legislature, not to subvert it when ascertained. . . The scope of the immunity must be measured by the purpose which Congress had in view and had constitutional power to accomplish. As that purpose involved the promotion of economy and efficiency in interstate transportation by the removal of the burdens of excessive expenditure, the removal of such burdens when imposed by state requirements was an essential part of the plan. The State urges that in the course of the passage of Transportation Act, 1920, a provision for federal incorporation of railroads was struck out. But while railroad corporations were left under state charters, they were still instrumentalities of interstate commerce, and, as such, were subjected to the paramount federal obligation to render the efficient and economical service required in the maintenance of an adequate system of interstate transportation.

The case was argued by Mr. A. R. Stout for the appellants; by Assistant Attorney General Stephens for appellees, the United States and the Interstate Commerce Commission; and by Mr. Samuel W. Moore for the railway companies, appellees.

War Risk Insurance—Status Under Fifth Amendment

War Risk Insurance policies are contracts of the United States creating vested property rights. Under the due process clause of the Fifth Amendment Congress is without power to annul them without making just compensation. Section 17 of the Economy Act was not intended merely to withdraw the remedy existing for enforcement of rights under the policies, but was intended to take away the rights themselves. There is nothing in the Act to indicate that Congress intended to remove the remedy if it was without constitutional power to withdraw the right.

Lynch v. United States, Adv. Op. Vol. 78, p. 997; Sup. Ct. Rep. Vol. 84, p. 840.

This opinion, by MR. JUSTICE BRANDEIS, dealt with the effect of the Economy Act on War Risk Insurance policies. In the two cases disposed of by the opinion, the petitioners are beneficiaries under policies for yearly

renewable term insurance issued during the World War under the War Risk Insurance Act of 1917. In one case the insured died in November, 1924, and in the other in May, 1929. The beneficiaries sued in appropriate federal courts to recover amounts alleged to be due under the respective policies. In each case the Government demurred to the petition on the ground that the courts had no jurisdiction over the cases, because the United States had withdrawn its consent to be sued by a provision in the Economy Act. The plaintiffs claimed that the Act deprived them of property without due process of law, in violation of the Fifth Amendment. The district courts sustained the demurrers and dismissed the complaints, and the judgments were affirmed by the circuit courts of appeals. On certiorari, the judgments were reversed by the Supreme Court.

The opinion of MR. JUSTICE BRANDEIS states the question involved in the following language:

> The only question requiring serious consideration relates to the construction and effect to be given to the clause of §17 of the Economy Act upon which the Government relies; for the character and incidents of War Risk Insurance and the applicable rules of constitutional law have been settled by decisions of this Court. The clause in question is:
>
> ". . . all laws granting or pertaining to yearly renewable term insurance are hereby repealed. . ."

In deciding the question the Court first described the War Risk Insurance policies, emphasizing the distinction between them and pensions and other gratuities, and pointing out that they are legal contracts, and that they are property and create vested property rights.

As contracts, creating vested property rights, their status under the Fifth Amendment was then considered and the conclusion was reached that Congress is without power to annul them, in the absence of conditions justifying such action under federal police power or some other paramount power. In this connection MR. JUSTICE BRANDEIS said:

> The Fifth Amendment commands that property be not taken without making just compensation. Valid contracts are property, whether the obligor be a private individual, a municipality, a State or the United States. Rights against the United States arising out of a contract with it are protected by the Fifth Amendment. . . When the United States enters into contract relations, its rights and duties therein are governed generally by the law applicable to contracts between private individuals. That the contracts of war risk insurance were valid when made is not questioned. As Congress had the power to authorize the Bureau of War Risk Insurance to issue them, the due process clause prohibits the United States from annulling them, unless, indeed, the action taken falls within the federal police power or some other paramount power. .
>
> The Solicitor General does not suggest either in brief or argument, that there were supervening conditions which authorized Congress to abrogate these contracts in the exercise of the police or any other power. The title of the Act of March 20, 1933, repels any such suggestion. Although popularly known as the Economy Act, it is entitled an "Act to maintain the credit of the United States." Punctilious fulfilment of contractual obligations is essential to the maintenance of the credit of public as well as private debtors. No doubt there was in March, 1933, great need of economy. In the administration of all government business economy had become urgent because of lessened revenues and the heavy obligations to be issued in the hope of relieving widespread distress. Congress was free to reduce gratuities deemed excessive. But Congress was without power to reduce expenditures by abrogating contractual obligations of the United States. To abrogate contracts, in the attempt to lessen government expenditure, would be not the practice of economy, but an act of repudiation. "The United States are as much bound by their contracts as are individuals. If they repudiate their obligations, it is as much repudiation, with all the wrong and reproach that term implies, as it would be if the repudiator had been a State or a municipality or a citizen."

The opinion then discussed the question of the immunity of the United States from suit, and recognized as all embracing the rule that they cannot be sued without consent, and that the consent once given may be withdrawn.

> Mere withdrawal of consent to sue on policies for yearly renewable term insurance would not imply repudiation. When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. . . It may limit the individual to administrative remedies. . . And withdrawal of all remedy, administrative as well as legal, would not necessarily imply repudiation. So long as the contractual obligation is recognized, Congress may direct its fulfilment without the interposition of either a court or an administrative tribunal.

Upon this analysis the controlling question was whether the cited provision of the Economy Act was intended to remove the remedy or to take away the right. Examination of the statute led to the conclusion that the purpose was to take away the right. In this connection, and referring to the provisions of §17, MR. JUSTICE BRANDEIS said:

> That section deals principally with the many grants of gratuities to veterans and dependents of veterans. Congress apparently assumed that here was no difference between the legal status of these gratuities and the outstanding contracts for yearly renewable term insurance. It used in respect to both classes of benevolences the substantially same phrase. It repealed "all public laws" relating to the several categories of gratuities; and it repealed "all laws granting or pertaining to" such insurance. No right to sue the United States on any of these gratuities had been granted in the several statutes conferring them; and the right to the gratuity might be withdrawn at any time. The dominant intention was obviously to abolish rights, not remedies.

The opinion refers also to the suggestion that by repealing all laws "granting or pertaining to yearly renewable term insurance" Congress intended to take away the remedy as well as the right and that it should be given effect at least to remove the remedy. This suggestion, the Court concluded, was in conflict with settled rules of construction, since there was nothing to indicate that a provision removing the remedy was intended to stand, if the right itself could not be constitutionally abrogated. The probable intention of Congress was summarized as follows:

> There is no separate provision in §17 dealing with the remedy; and it does not appear that Congress wished to deny the remedy if the repeal of the contractual right was held void under the Fifth Amendment.
>
> War Risk Insurance and the war gratuities were enjoyed, in the main, by the same classes of persons; and were administered by the same governmental agency. In respect of both, Congress had theretofore expressed its benevolent purpose perhaps more generously than would have been warranted in 1933 by the financial condition of the Nation. When it became advisable to reduce the Nation's existing expenditures, the two classes of benevolences were associated in the minds of the legislators; and it was natural that they should have wished to subject both to the same treatment. But it is not to be assumed that Congress would have resorted to the device of withdrawing the legal remedy from beneficiaries of outstanding yearly renewable term policies if it had realized that these had contractual rights. It is, at least, as probable that Congress overlooked the fundamental difference in legal incidents between the two classes of benevolences dealt with in §17 as that it wished to evade payment of the Nation's legal obligations.

The case was argued by Mr. Rowland W. Fixel for the petitioner, and by Mr. Edward S. H. Martin for the petitioner in a case involving the same question as the Lynch case and dealt with in the same opinion. Solicitor General Biggs argued the cause for respondent.

(*Continued on page* 578)

"A RIVER IS A TREASURE"

Litigation over Interstate Rivers Is on the Increase and It Is Fast Crowding Boundary Suits out of Their Leadership as the Most Numerous in the Class of Original Cases before the United States Supreme Court—Important Part Played by Justice Holmes in Laying Down Principles to Govern Interstate Water Diversion Suits—In Resolving Equities between Peoples of Litigating States Court Has Approved a Wide Range of Inquiry—Brief Notes of Important Cases Involving Conflicting Claims to Interstate Waters—Dangers to States with Appropriation Doctrine, etc.*

By William R. Kelly
Member of the Greeley, Colo., Bar

"A RIVER is more than an amenity, it is a treasure," said Justice Holmes, the much revered veteran of the United States Supreme Court, in announcing the decision in New Jersey v. New York, on May 4, 1931.[1]

Like other treasure, its realization becomes more and more the cause of defensive and protective (and also, sometimes, of aggressive) measures. The litigation over interstate rivers is on the increase. The forum for such suits is the United States Supreme Court, since they are carried on as actions between states, and such suits are brought originally in the highest court in the land. They are fast crowding boundary suits out of their leadership as most numerous in the class of original cases before the Supreme Court. Some of the boundary cases, in reality, have in the background the question of who shall have power over waters of rivers on the line.

None of the last five volumes of the United States Reports is without some decision in an interstate water suit.

Other suits between states over waters of interstate streams are now pending. Increase of population and settlement of western farm, as well as eastern metropolitan, areas have brought out into startling relief how important, in the destinies of commonwealths, are to be the parcellings out of the rights in waters of these rivers. A series of years of drouth has made communities "water minded." Irrigation, manufacturing, make increasing water demands.

Pressing needs for domestic water for the growing metropolitan centers of Boston, New York, Los Angeles, were the immediate occasions from which the three cases in 283 U. S., Connecticut v. Massachusetts, New Jersey v. New York, Arizona v. California, arose. Baths and even tooth brushing take more water than in the old washtub and glass tumbler days.

Irrigation was a large factor in the Arizona case, as it was in the four cases between Kansas and Colorado, Wyoming vs. Colorado.

Chicago sewage disposal, to accomplish which the Chicago River was reversed, so that it drains Lake Michigan, instead of flowing into it, was the object from which resulted the several suits known as the "Chicago Lakes Drainage cases," Missouri v. Illinois, Wisconsin v. Illinois, Michigan v. Illinois. The lowering of the water level of the Great Lakes precipitated not only several interstate suits. It has involved us in an international controversy with our neighbor Canada. This situation is still prophetic of much litigation.

It is of interest that Justice Holmes had much to do with laying down the principles to govern interstate water diversion suits. In 1884, while on the Supreme Court of Massachusetts, he wrote the pioneering opinion, in Manville County v. Worcester, 138 Mass. 89, where Rhode Island, as the lower state, was concerned. On the Supreme Court, in 1907, in Hudson Water Co. v. McCarter, 209 U. S. 353, between a private party and the State of New Jersey, the water company, against a recent New Jersey statute, was seeking to take the water out of that state against its will, and into New York. In sustaining the New Jersey official, Justice Holmes gave expression to a principle private owners had been inclined not to contemplate:

> "It is sometimes difficult to fix boundary stones between the private right of property and the police power when, as in the case at bar, we know of few decisions that are very much in point. But it is recognized that the State as quasi-sovereign and representative of the interests of the public has a standing in court to protect the atmosphere, the water and the forests within its territory, *irrespective of the assent or dissent of the private owners of the land most immediately concerned.*"[2] Citing Kan. v. Colo. 185 U. S. 125, 142, 206 U. S. 46, 99.

He has written the opinion in Missouri v. Illinois, 200 U. S. 496; Georgia v. Tenn. Copper Co., 206 U. S. 230, 237 U. S. 474. He participated in every notable interstate waters decision.

What is the procedure in these original suits? The Supreme Court acts as a trial court. The evidence is there first presented, considered, and the rights, legal or equitable, are there first determined. Therefrom is no appeal. It is natural to ask, do the Justices of the Supreme Court in person see and hear the witnesses? Such would not be practicable in this day, for this great tribunal disposes now of a thousand cases a year. In many of these interstate water suits testimony is taken for months and the aggregate of days in them would leave time for little else.

In practice the Court appoints a referee, or Master in Chancery, who acts for the Court in

*The title of this article is taken from an opinion by Mr. Justice Holmes, quoted in second column of page 561, this issue.

1. 283 U. S. 342, 75 L. Ed. 1104.

2. Kansas v. Colorado, 185 U. S. 125, 141, 142; Id. 206 U. S. 46, 99.

taking the testimony, having it transcribed, reduced to narrative form, and printed for filing with the Court. Sometimes he is commissioned also to make findings of fact, conclusions of law, and to prepare a recommended decree, as was the case, for instance, in the trial of one phase of the Chicago Lakes Drainage case, where the Hon. Charles E. Hughes was appointed Master in Chancery. His comprehensive and intelligent report, findings and recommended decree were highly complimented, as well as adopted, by the high tribunal of which he had been an associate and of which he was later to become Chief Justice.

The jurisdiction of the Supreme Court of the United States, in controversies between states, is generally limited to disputes which, between states entirely independent, might properly be the subject of diplomatic adjustment.[3]

Lately the states have been trying diplomatic adjustment by compacts, of which a number have been negotiated by commissioners, approved by the legislatures and by congress. The Court has intimated they are commendable. But their efficacy is not yet thoroughly tested by judicial decision in these interstate water matters. The effect of the Six-State Compact over the Colorado River was drawn in, but was not definitely determined in the Arizona v. Colorado decision, except in so far as to say it is not binding on Arizona. A test of the compact between New Mexico and Colorado over the waters of the La Plata River,[4] was decided by the Colorado Supreme Court adversely to the validity of that particular compact, on the ground it is violative of due process to the individual appropriator who may be affected. It will probably be up for early decision by the United States Supreme Court. In the end that Court must determine the validity of any such compact.

At any rate, compacts, as yet, are in the realm of the uncertain as a definition of interstate water controversies. There is cause to feel that resort to the United States Supreme Court is after all the promptest and most reliable method, even though the process there is sometimes slow for an enterprise under construction, as in the first Wyoming v. Colorado suit, which was pending in that Court from May, 1911, to October, 1922, over eleven years before final decision. But the Arizona v. California case, filed October 13, 1930, was decided May 18, 1931 (without evidence).

Since these suits are between quasi-sovereigns, and are to decide issues which between nations would be decided by war if not by judicial means, the Supreme Court has gradually outlined principles or rules of practice for itself as a quasi-international tribunal. No specific rules are laid down for conduct of these trials, where the Supreme Court has original jurisdiction, but they are of an equitable nature and it has been said that they fall under the principle that, where there are not specific rules, those principles which governed the High Court of Chancery of England down to our Constitution shall prevail.

At any rate, in resolving the equities between the peoples of the two quasi-sovereigns, a wide range of inquiry seems to have been approved. Judicial notice, congressional documents, as to navigability of certain stretches of the Colorado River, other public documents, are given considerable application, as in the Boulder Dam case.[5]

While rehearing of a decision once announced in these cases is rare, nevertheless, in the Kansas v. Colorado case and in its most recent decisions the Court has felt it wise that some opportunity should be held open for a further consideration of the rights of the contending states and their respective water users. In all three of the decisions in Vol. 75 L. Ed., (Arizona v. California, Connecticut v. Massachusetts, New Jersey v. New York) it has offered the suggestion that if substantial invasion of the rights of the complaining state were later shown, on additional evidence the case might be renewed. If international controversies generally are a criterion, it is but natural that this principle be held out to controversies between the quasi-sovereign states of the Union. But in the decision of Wyoming v. Colorado, apportioning the waters of the Laramie River, no such reservation was expressed. However, the case was argued three times.

The original jurisdiction of the Supreme Court of the United States is conferred by the Constitution, and although without limit, high or low, as to the amount in controversy, it was early declared as nevertheless limited and intended to be sparingly exercised and not to be extended by construction.[6]

In deciding these suits between states over the waters of interstate streams, the Supreme Court, in its capacity of a final and quasi-international tribunal, has been disposed to take a large view of the questions it is to determine. Matters not of substantial importance are not to be disturbed or to be made the cause of intervention of the federal authority which the decision of the Supreme Court in such cases sets into execution.

The basis of decision in apportionment of water in suits between states in the U. S. Supreme Court is reviewed in Conn. vs. Mass., 282 U. S., page 660, 790, decided Feb. 24, 1931, 75 L. Ed. 602, 1416.

Connecticut sued Massachusetts to enjoin her from diverting water from the watershed of the Connecticut River to provide water for Boston and neighboring cities.

Connecticut alleged the proposed diversion will take water out of the river to the detriment of its navigability and inundation of lands, diminish the run of shad, decrease the river capacity to discharge sewage.

The Court took occasion to point out some principles developed as controlling the U. S. Supreme Court in imposing its decree against states:

"The governing rule is that this court will not exert its extraordinary power to control the conduct of one state at the suit of another, unless the threatened invasion of rights is of serious magnitude and established by clear and convincing evidence. New York v. New Jersey, 256 U. S. 296, 309, 65 L. Ed. 937, 943, 41 S. Ct. 492. Missouri v. Illinois, 200 U. S. 496, 521, 50 L. Ed. 572.

"The burden on Connecticut to sustain the allegations on which it seeks to prevent Massachusetts from making the proposed diversions is much greater than that generally required to be borne by one seeking an injunction in a suit between private parties. North Dakota v. Minnesota, 263 U. S. 365, 374, 68 L. Ed. 342, 345, 44 S. Ct. 138. There has been brought forward no adequate reason for disturbing the master's findings of fact. They are amply sustained by the evidence and are adopted by the court.

"Connecticut suggests that, under the common law in force in both states, each riparian owner has a vested right in the use of the flowing waters and is entitled to have them to flow as they were wont, unimpaired as to quantity and uncontaminated

3. No. Dak. v. Minn., 263 U. S. 365, 68 L. Ed. 342.
4. La Plata River and Cherry Creek D. Co. v. Hinderlider, State Engineer, 93 Colo. 128, 25 Pac. (2d) 137.
5. Ariz. v. Calif., 283 U. S. 423, 75 L. Ed. 1154.
6. California v. So. Pac. Co., 157 U. S. 229, 39 L. Ed. 683.

as to quality. It maintains that the taking of waters from the Ware and Swift infringes vested property rights in that state which cannot be taken without its consent against the will of the owners. And it insists that this court, following the law enforced by each of the states within its own boundaries, should grant injunction against any diversion from the watersheds of these rivers.

"But the laws in respect to riparian rights that happen to be effective for the time being in both states do not necessarily constitute a dependable guide or just basis for the decision of controversies such as that here presented. The rules of the common law on that subject do not obtain in all the States of the Union, and there are variations in their application. The doctrine of appropriation prevails in some states.

"And every state is free to change its laws governing riparian ownership and to permit the appropriation of flowing waters for such purposes as it may deem wise. United States v. Rio Grande Irrig. Co., 174 U. S. 690, 702, 43 L. ed. 1136, 1141, 19 S. Ct. 770.

"For the decision of suits between states, federal, state and international law is considered and applied by this court as the exigencies of the particular case may require. The determination of the relative rights of contending states in respect of the use of streams flowing through them does not depend upon the same considerations and is not governed by the same rules of law that are applied in such states for the solution of similar questions of private right. Kansas v. Colorado, 185 U. S. 125, 146, 46 L. ed. 838, 846, 22 S. Ct. 552. And, while the municipal law relating to like questions between individuals is to be taken into account, it is not to be deemed to have controlling weight.

"As was shown in Kansas v. Colorado, 206 U. S. 46, 100, 51 L. ed 956, 975, 27 S. Ct. 655, such disputes are to be settled on the basis of equality of right. But this is not to say that there must be an equal division of the waters of an interstate stream among the states through which it flows. It means that the principles of right and equity shall be applied having regard to the 'equal level or plan on which all the states stand, in point of power and right, under our constitutional system', and that, upon a consideration of the pertinent laws of the contending states and all other relevant facts, this court will determine what is an equitable apportionment of the use of such waters. Wyoming v. Colorado, 259 U. S. 419, 465, 66 L. ed. 999, 1013, 1015, 42 S. Ct. 552.

"The development of what Mr. Justice Brewer, speaking for the Court in Kansas v. Colorado, 206 U. S. 46, 98, 51 L. ed. 956, 975, 27 S. Ct. 655, refers to as interstate common law, is indicated and its application for the ascertainment of the relative rights of states in respect of interstate waters is illustrated by Missouri v. Illinois, 200 U. S. 496, 50 L. ed. 572, 26 S. Ct. 268; Kansas vs. Colorado, supra; Wyoming vs. Colorado, 259 U. S. 419, 465, 470, 66 L. ed., 999, 1013, 1015, 42 S. Ct. 552, supra, and Wisconsin v. Illinois, 278 U. S. 367, 73 L. ed. 426, 49 S. Ct. 163, 281 U. S. 179, 74 L.ed. 799, 50 S. Ct. 266. Two of these cases are much like the one at bar.

"Kansas v. Colorado was a suit to prevent the latter from withholding waters of the Arkansas river from flowing as they were wont through Kansas. The common law rule as to riparian ownership was then generally recognized in Kansas while in Colorado the doctrine of appropriation prevailed. The Court held that the upper state was not entitled to use the waters of the Arkansas flowing therein as it chose regardless of resulting conditions or impairment of the right to the use of such waters in the lower state. It was shown that, without diversion from the watershed, the waters of the Arkansas in Colorado were and for many years had been used to irrigate and make productive what theretofore had been barren lands. It was found that the resulting diminution of the flow of the river caused perceptible injury to a portion of the valley in Kansas, but that it had been of little, if any, detriment to the great body of the valley. The Court held (206 U. S. at p. 114, 51 L. ed. 980, 27 S. Ct. 655) that the rule of equality of right forbade interference with the existing withdrawals of water in Colorado.

"In Wyoming v. Colorado the former sued to prevent a diversion of the waters of the Laramie River which rises in Colorado and flows into Wyoming. Both states are in the arid region and apply the doctrine of appropriation. Wyoming objected on the ground that the diversion was to another watershed. The court held (259 U. S. p. 467, 66 L. ed. 1014, 42 S. Ct. 552) that: 'The principle of such diversions being recognized in both states, its application to this interstate stream does not in itself afford a ground for complaint, unless the practice in both be rejected in determining what, as between them, is reasonable and admissible as to this stream, which we think should not be done.' The problem there presented was expressed as follows (p. 467): 'We are thus brought to the question of the basis on which the relative rights of these states in the waters of this interstate stream should be determined. Should the doctrine of appropriation, which each recognizes and enforces within her borders be applied? Or is there another basis which is more consonant with right and equity?' After an elaborate discussion of the facts, the court said (p. 470): 'We conclude that Colorado's objections to the doctrine of appropriation as a basis of decision are not well taken, and that it furnishes the only basis which is consonant with principles of right and equity applicable to such a controversy as this is'."

New Jersey v. New York, 283 U. S. 336-348, followed Connecticut v. Massachusetts and was decided in the same term, on May 4, 1931. New York was proposing to divert, by dams and reservoirs, a large amount of water from the tributaries of the Delaware and from its watershed to the watershed of the Hudson, to increase the domestic water supply of the City of New York. New Jersey insisted on strict application of the riparian rights. Pennsylvania intervened to protect against anything to prejudice its future needs.

Justice Holmes said:

"We are met at the outset by the question what rule is to be applied. It is established that a more liberal answer may be given than in a controversy between neighbors members of a single state. Connecticut v. Massachusetts, Feb. 24, 1931. 282 U. S. 660. Different considerations come in when we are dealing with independent sovereigns having to regard the welfare of the whole population and when the alternative to settlement is war.

"In a less degree, perhaps, the same is true of the quasi-sovereignties bound together in the Union. A river is more than an amenity, it is a treasure. It offers a necessity of life that must be rationed among those who have power over it. New York has the physical power to cut off all the water within its jurisdiction. But clearly the exercise of such a power to the destruction of the interest of lower States could not be tolerated.

"And on the other hand equally little could New Jersey be permitted to require New York to give up its power altogether in order that the river might come down to it undiminished. Both states have real and substantial interests in the river that must be reconciled as best they may be.

"The different traditions and practices in different parts of the country may lead to varying results but the effort always is to secure an equitable apportionment without quibbling over formulas. See Missouri v. Illinois, 200 U. S. 496, 520. Kansas v. Colorado, 206 U. S. 46, 98, 117. Georgia v. Tennessee Copper Co., 206 U. S. 230, 237. Wyoming v. Colorado, 259 U. S. 419, 465, 470. Connecticut v. Massachusetts, Feb. 24, 1931."

In this case the injunction prayed by New Jersey was denied, in so far as it would restrict the State of New York from diverting from the Delaware River or its tributaries to New York City the equivalent of four hundred and forty million gallons of water daily, but was granted to restrain the State of New York from diverting water in excess of that amount.

The Court also imposed other restrictions, among them sewage treatment and release of water from replacement reservoirs, to meet situations when the stage of the river would fall below certain volumes.

The Supreme Court also awarded to the States of New Jersey and Pennsylvania, through their accredited representatives, the right to go into the State of New York to inspect at all reasonable times the dams, reservoirs, and other works constructed by the City of New York, and to inspect the diversion areas and the inflow, outflow and diverted flow of said areas, and to inspect the meters and other apparatus installed by the City of New York and to inspect all records pertaining to inflow, outflow and diverted flow.

The decision also denied the prayer of Pennsylvania for allocation to it of a specified amount of water daily but without prejudice. The prayer of Pennsylvania for appointment of a River Master was denied, without prejudice. The Supreme Court

retained jurisdiction of the suit for the purpose of allowing later applications for relief and for any order or direction or modification of this decree, or any supplemental decree that it may deem at any time to be proper.

What the Supreme Court seeks to determine in these cases is always an *equitable apportionment* of the waters between the two states. In so doing it may disregard the fact that *some* citizens of the one state may have a special injury if the result to the state as a whole is equitable.

In the Kansas v. Colorado decision the Supreme Court, although some individual Kansas water users near the Colorado line were found to suffer depletion of water, held no injunction was to be entered since the effect of Colorado irrigation was "of little detriment, if any, to the great body of the valley" in Kansas.

"The right of a state as *parens patriae* to bring suit to protect the general comfort, health, or property rights of its inhabitants, threatened by the proposed or continued action of another state, by prayer for injunction, is to be differentiated from its lost power as a sovereign to present and enforce individual claims of its citizens as their trustee against a sister state."—No. Dak. v. Minnesota, 263 U. S. 365, 68 L. Ed. 342.

In Connecticut v. Massachusetts Justice Holmes said:

"Before this Court ought to intervene the case (injunction by one state against another as to use of a river) should be of serious magnitude, clearly and fully proved, and the principle to be applied should be one which the Court is prepared deliberately to maintain against all considerations on the other side." Citing Kansas v. Colorado, 185 U. S. 125, 46 L. Ed. 838.

But that the Court's judgment may carry with it considerable burdens, once the controversy is submitted by a state to the equitable powers of the United States Supreme Court, has been demonstrated in the Illinois suits and the Delaware and New York decree. In the last Illinois decision compliance with the decree theretofore entered was commanded, even though it may require amendment of the State Constitution. In both decisions costly construction of works for sewage disposal and flow control were imposed as conditions on the state gaining the right to divert the water.

The United States Supreme Court commanded the State of Illinois affirmatively to provide money to complete sewage disposal works in Chicago and controlling works in the Chicago drainage canal, required by the Court's earlier decree in the so-called Chicago Lake Water Diversion case.

The Sanitary District of Chicago showed itself without funds to complete the sewage disposal and controlling works, pleading that the Illinois Legislature had refused to authorize the sanitary district to issue bonds to procure funds for construction. The Supreme Court of the United States specifically required the state to raise the money, reaffirming Mr. Justice Holmes, declaring that "if the constitution of Illinois stands in the way of prompt action, it must amend it, or yield to an authority that is paramount to the state."

The decision amplifies:

"The authority of the court to enjoin the continued perpetration inflicted upon complainants necessarily embraces the authority to require measures to be taken to end conditions within the control of defendant state which may stand in the way of the execution of the decree."

The Court also enlarged its decree, 281 U. S. 196, in the so-called Chicago Lake Water Diversion Case, requiring the State of Illinois "to take all necessary steps, including whatever authorizations or requirements, or provisions for the raising, appropriation and application of moneys, which may be needed in order to secure the completion of adequate sewage treatment and works and other incidental facilities for the disposal of sewage so as to preclude any ground of objection to the reduction, as provided by the decree, of the diversion of water from Lake Michigan through the Chicago Drainage Canal." There the Special Master had found that there is no way by which the decree can be performed under tolerable conditions "unless the State of Illinois meets its responsibility and provides the money."

It is held the state, by virtue of its status and authority as a state, is the primary and responsible defendant. The main decree, it is declared, in terms bound the State of Illinois, no less than its creature, the Sanitary District. This opinion is by Chief Justice Hughes (Special Master in a former hearing) and is reported in 289 U. S., page 395, 77 L. Ed., page 1283.

The Court was not hesitant to express itself as to its intention to enforce its decree in suits between sovereign states, and although this decision was only entered May 22, 1933, it commands the State of Illinois to file in the office of the Clerk of the Supreme Court, on or before October 2, 1933, a report of its action in compliance with the provision requiring the raising of moneys necessary for construction.

Not inconsequential is the matter of costs in these interstate river suits. Under its equity powers the United States Supreme Court determines what are costs and who shall bear them. In an involved and protracted case, such as the Chicago River suits against Illinois, these costs naturally may become high. In North Dakota v. Minnesota, 263 U. S. 583, 68 L. Ed. 461, is an interesting discussion of costs in these interstate suits. The usual disposition seems to have been to divide the costs. In the first Wyoming v. Colorado suit they were assessed to the two states, one third each, the other one third jointly to the two corporate defendants. In the Illinois case the Special Master's services alone were thirty thousand dollars, besides his expenses, and were taxed to Illinois.

In the western states, where the right of appropriation is in nearly every instance guaranteed by the state constitution and has obtained from the beginning, it is at first a shock to the appropriator to be told every state is free to change its laws governing riparian ownership. But it is to be observed this statement declares freedom to change laws governing riparian ownership, and has, as yet, not declared freedom of a state to change rights acquired by appropriation. The western farmer and city dweller, depending on appropriation, usually having had their rights adjudicated by prolonged proceedings in the state court, have rested secure in the assurance it is a vested right not to be lightly destroyed. In fact, the definition of appropriation in the Court's opinion written by Mr. Justice Brandeis in Arizona v. California declares this.

The Constitutions establish that the flowing water in it is the property of the state itself, that the appropriator has only the right to its use. Nevertheless, another principle has now become well established, which is, that the rights to the use of waters of an interstate river are not the exclusive property of that state wherein the waters are found. They are the property of both states and

subject, when the occasion shall arise, to equitable apportionment by the United States Supreme Court. And there is no fixed rule for that apportionment, but it shall be determined by that tribunal according to what seem the equities of the particular case. The Court has taken pains to outline its approach to these problems in the opinion in Connecticut v. Massachusetts and has epitomized it in the later language of New Jersey v. New York above quoted.

In Arizona v. California, Nevada, Utah, New Mexico, Colorado, Wyoming, 283 U. S. 423, 464, 75 L. Ed. 1154, the opinion was by Justice Brandeis. It was an original suit against Wilbur, Secretary of the Interior, California and the five other states, to enjoin carrying out of the Boulder Dam project, authorized by the Act of Congress of December 21, 1928, for building, at United States expense, at Black Cañon on the Colorado River, partly in Nevada, partly in Arizona, a dam, storage reservoir, hydro-electric plant, "subject to the terms of the Colorado River compact." This compact was an apportionment of the waters of the river between the "upper" and "lower" basins of the seven states involved, but Arizona had failed to ratify it, and claimed, in the suit, that the Boulder Dam Act would enforce against Arizona the compact it had refused.

The Court held this apprehension no ground for injunction, and Arizona not bound by the compact. To Arizona's allegation that the Secretary of the Interior had failed to comply with its statute requiring that he apply to the State of Arizona for leave to build the dam, the court held the dam was within federal powers, and that "The United States may perform its functions without conforming to the police regulations of a state," and that its Secretary of Interior is under no obligation to submit the plans and specifications to the State Engineer for approval.

The Court took judicial notice, from other decisions, and from many congressional bulletins, that the river is navigable at the portion involved, notwithstanding a positive allegation of Arizona that the river there was not navigable. The decision holds that, as the river is navigable, and the means which the Act provides are not unrelated to the control of navigation, the erection and maintenance of such dam and reservoir are clearly within the powers conferred upon Congress, even though other purposes (domestic, irrigation, power water supply) will also be served.

Arizona further alleged that the mere existence of the Act will invade quasi sovereign rights of Arizona by preventing the state from exercising its right to prohibit or permit under its own laws the appropriation of unappropriated waters flowing within or on its borders. Here the Supreme Court gives the definition of appropriation (Col. 1, p. 1168, 75 L. Ed.):

"To appropriate water means to take and divert a specified quantity thereof and put it to beneficial use in accordance with the laws of the state where such water is found, and, by so doing, to acquire under such laws, a vested right to take and divert from the same source, and to use and consume the same quantity of water annually forever, subject only to the right of prior appropriations.

"Under the law of Arizona, the perfected vested right to appropriate water flowing within the state cannot be acquired without the performance of physical acts through which the water is and will in fact be diverted to beneficial use. Topographical conditions make it necessary that land in the state be irrigated in large projects. The Colorado River flows, both on the boundary between Arizona and Nevada, and in Arizona alone, through an almost continuous series of deep canyons, the walls of which rise in Arizona to a height varying from a few hundred to more than 5000 feet. The cost of installing the dams, reservoirs, canals and distribution works required to effect any diversion, will be very heavy; and financing on a large scale is indispensable. Such financing will be impossible unless it clearly appears that, at or prior to the time of constructing such works, vested rights to the permanent use of the water will be acquired."

As to future appropriations which Arizona alleges are threatened, the Court said: (75 L. Ed. 1170).

"There is no allegation of definite physical acts by which Wilbur is interfering, or will interfere, with the exercise of Arizona of its right to make further appropriations by means of diversions above the dam or with the enjoyment of water so appropriated. Nor any specific allegation of physical acts impeding the exercise of its right to make future appropriations by means of diversions below the dam, or limiting the enjoyment of rights so acquired, unless it be preventing an adequate quantity of water from flowing in the river at any necessary point of diversion.

"When the bill was filed, the construction of the dam and reservoir had not been commenced. Years must elapse before the project is completed. If by operations at the dam any then perfected right of Arizona, or of those claiming under it, should hereafter be interfered with, appropriate remedies will be available. Compare Kansas v. Colorado, 206 U. S. 46, 117, 51 L. Ed. 956, 983, 27 S. Ct. 655. The bill alleges that plans have been drawn and permits granted for the taking of additional water in Arizona pursuant to its laws. But Wilbur threatens no physical interference with these projects; and the Act interposes no legal inhibitions on their execution. There is no occasion for determining now Arizona's right to interstate or local waters which have not yet been, and which may never be, appropriated. New Jersey v. Sargent, 269 U. S. 328, 338, 70 L. ed. 289, 294, 46 S. Ct. 122. This court cannot issue declaratory decrees."

The Court concluded, saving Arizona's rights:

"The bill is dismissed without prejudice to any application for relief in case the stored water is used in such a way as to interfere with the enjoyment by Arizona, or those claiming under it, of any rights already perfected or with the right of Arizona to make additional legal appropriations and to enjoy the same."

As in the Kansas v. Colorado, Connecticut v. Massachusetts, New Jersey v. New York, decisions, the Court adhered to its reluctance to interfere with states by injunctions in the absence of strong showing of actual rather than mere apprehended injuries.

Since an appropriation of the use of water is recognized as a right vested in the individual holding it, it is not strange that the view has been held by the citizen of a state that, for any litigation to take it away from him, he, individually, would have to be made a party, to have his day in Court to defend this right. Such was the view, doubtless, of other appropriators of water in Colorado out of the Laramie River. About fifty ranchers, who had ditches and reservoirs in Colorado, made claims in state courts for water of that river and were using it in Colorado, but were not named as parties defendant in the suit which Wyoming, in 1911, brought against the State of Colorado and the two individual corporate claimants who were constructing and about to divert water through the Laramie-Poudre tunnel.

Even should it be concluded, as it might be, between western states, such as Wyoming and Colorado, where both have the appropriation doctrine, that the question shall be resolved by determining the respective priorities of appropriation in the two states disregarding state lines, the question is not capable of independent appraisal by an intending appropriator. The reason for this is, that

each state has its own peculiar method of adjudicating priorities of appropriations. The matter of interpretation of inception and of rights of appropriation and to what date or first step shall be their relation of seniority, has different significance and administrative construction in the several states. In one it may be liberal, in another more strict as to how much diligence and physical construction is necessary to enable the appropriator to have his priority date back to the initial survey, for instance.

Some states relate the date of the appropriation back to the first declaration of notice of intent to make the appropriation. Others require that the appropriation shall date only from first physical acts and a long period of inquiry as to actual application of the amount in question to beneficial use by actual, continued application to the land in irrigation.

In the Wyoming vs. Colorado decision, after deciding the doctrine of appropriation should be the one applied in employing equitable apportionment, the Supreme Court related the Colorado high altitude undertaking, then a difficult one for private capital (one feature alone being a two and one-fourth mile tunnel) only from commencement of actual rock and earth moving in 1909. The Colorado Courts in water adjudication had related it to the surveys of 1902.

So we have the principle that vested right may be vested as to other appropriators of the same state, but not as to the citizens of another state. At any rate, it is plain that those in an upper state intending to exercise their rights of appropriation from a stream, must take notice that their appropriations are derived only from their own state, and that the extent of rights of the citizens of that state are subject to determination by courts not of either state, but may be decided by the United States Supreme Court in a suit between the states and may be less than their state has been assuming was its share of the waters of that stream. One state and its courts and legislature may not impose its will upon another.[7]

Another principle which has been a little beyond the boundary of thought of the water appropriator of a western state has been that his water right could be taken away from him in a suit in which he was not specifically made a party. He knows of the controversies he has with other appropriators on the same stream within his own state, the difficulties in attaining exactitude, and the clashes over them with the water administrative departments of his own state, and of the multitude of suits over conflicting water rights in his local courts; so it is hard for the individual appropriator to grasp the idea that in a suit by one state, naming only his own state as defendant, his water rights may be determined without his having the right to set forth his supposed vested right. Yet such is now considered established by the refusal of the court to let the individual appropriators intervene in the pending case of Colorado v. Kansas.

If there was any question that the individual ditch owner was bound by a suit between states over the water of a particular river, it seemed to be put at rest in the second Laramie River case of Wyoming v. Colorado, where, in response to Colorado's contention that the injunction in the first suit was only against the works of one individual defendant and was not an injunction as against other appropriators, the court held that every citizen of Colorado was to be considered as having been represented by the State of Colorado, made one of the defendants in the first suit.

In the opinion of the Court by Mr. Justice Vandevanter May 31, 1932, 289 U. S. 494, 76 L. Ed. 1245, it was held that all water claimants in Wyoming and all in Colorado, and not alone those who had been specifically made defendants in the first suit, brought by Wyoming against Colorado and two individual claimants, "were represented by their respective states and are bound by that decree."

Will the treasure be lost for states less favored with federal moneys for construction of works?

Arizona is not the only state to be apprehensive over possible effect upon its destiny of early constructions and diversions by other states which might, on ultimate Supreme Court adjudication, be held to have given rise to superior vested rights in another state by appropriation. This same apprehension has occurred to other of the newer states in their own limited resources laboring to develop the destinies of their respective communities.

The recent decision in New Jersey v. New York, 283 U. S. 336-348, 75 L. Ed. 1104, added a new safeguard against dangers to the state concerned. It provided that the diversion allowed New York should not constitute a prior appropriation or give New York any superiority or right over New Jersey and Pennsylvania in the enjoyment and use of the Delaware River.

This very possibility as a concomitant to federal aid to one state is a natural cause of disquietude to the less favored state on the river. In water diversion construction, as nowhere else, this federal bounty carries implications of favor far beyond that in any other construction. The Supreme Court appears in the New Jersey case to sense this.

> When the federal government makes a grant of a large sum of money to do construction work to divert the water of a river, will it result that, in the end, not alone the money, but also, what is of much greater value, the right to use of the water of the river, in perpetuity has gone to the state first favored with the money, and so first able to get its appropriation complete by construction of works and application of the water thereby to the use intended?
>
> By the $185,000 000 federal money allocated for construction of the Colorado River dam at Black Cañon, "Hoover" or "Boulder Dam," California citizens were given a huge advantage in money to accomplish the appropriation of water of the Colorado River; by the federal allocations of $63,000,000 to the State of Washington for the Grand Coulee project, that state is given a tremendous advantage over others on the Columbia. By the appropriation of $23,000,000 of United States money to Wyoming in 1933, and of what, in the aggregate, nearly equals it to Nebraska, for construction of works in those states to appropriate waters of the North Platte River, which officials of those states now claim appropriates all that water, will Colorado citizens be deprived of the hope to prosecute like appropriations for irrigation of their farm lands, and because of great cost and controversy as to whether any water is left, will other communities be foreclosed of reasonable hope to accomplish such costly construction? Will federal aid to one community be federal injury to another because of handicapped position and funds? Federal aid in dam and ditch construction is, as a practical matter, more than the mere money; it may be giving all the water of the river also. That is still a matter for equitable apportionment in the interstate river suits.

7. Kansas v. Col., 206 U. S. 97.

DEPARTMENT OF CURRENT LEGISLATION

The National Housing Act Explained*

By James N. MacLean
Member of the New York Bar

IN planning the National Housing Act the draftsmen have perhaps ventured further in experiment than in any of the other laws designed to relieve the depression.

The success of this Act depends upon whether the reactions of individuals and lending institutions will be what the administration expects them to be, but the Act has one great advantage, the extent of its operation will correspond to the economic demand, and even if it proves a failure in the amount of business transacted, no harm will be done to the industrial affairs of the nation.

The Act is based upon the following facts claimed to have been previously ascertained, and no doubt ascertained with a good deal of accuracy.

1. That industrial recovery in consumable goods has proceeded to a point almost 90% of normal, but that dead areas exist in capital or permanent goods, centered largely in the building industry, due to the total lack of mortgage moneys to finance repairs and new construction, and that in consequence this industry is responsible by far for the greater part of the present continuing unemployment.

2. That for the past three years the repair of buildings, particularly homes, has practically ceased, and that there is an enormous demand for funds to finance such work.

3. That the average family spends about 25% of its income in purchasing things upon the instalment plan, and that loans repayable in instalments up to this percentage of income may be made with a reasonable degree of safety, and that the losses on such loans ought not to be over five per cent of the total.

4. That banks and lending agencies are full of stored money, and that the release of these funds in personal loans and real estate mortgages, either to refinance existing mortgages or to pay for new construction where there is a justifiable demand for it, will greatly stimulate the building industry and aid in the general recovery.

In order to accomplish the purpose last stated, the federal government in this Act has attempted the experiment of endeavoring to induce private capital to reenter this field by a governmental guarantee or insurance against loss on loans on personal credit for repairs, and of mortgages for refinancing or for new construction where there is a reasonable demand.

The experimental part lies in the question as to whether there will be a large demand for these personal loans and whether the terms of the guarantees offered will be sufficient to induce lending agencies to make either the personal loans or to resume lending on mortgage.

The following are the different proposals of the Act:

Title I relates to loans upon personal credit for repairs only, upon any class of building, each loan not to exceed $2,000.

These loans are to run from one to five years, amortized so they will pay out by monthly instalments at the end of the loan period. They are to be made only to those whose personal credit is sufficiently good, and will not exceed 25% of the income of the borrower. No mortgage or security will be required.

To induce banks and other lending agencies to make these loans the government will guarantee them against loss up to 20% of the total amount of the loans made by the agency, it being estimated that this is a percentage far above the possible rate of loss.

The borrower will pay interest and service charges, the total of which has been estimated to make the true interest rate from seven to eleven per cent, depending upon local conditions.

The rate of interest and the credit requirements will be fixed by the government through the Federal Housing Administrator. The Act does not fix the cost nor does it authorize the government to charge any premium for the insurance. Consequently the treasury will, in theory, have to bear the entire amount of the losses up to 20% of the total of the loans made, without any possible return. In this respect this part of the Act represents an actual expenditure by the government and does not set up a plan like the Home Owners' Loan Corporation in which the government can theoretically even make a profit.

The total amount of loans which may be thus insured is limited to one billion dollars and the liability assumed by the government is therefore two hundred million dollars. The question of how much of this the government will eventually have to pay will be determined by the credit standards set up. Some loss is of course inevitable.

In planning this title the administration has drawn upon the experience of lending agencies such as the National City Bank Personal Loan Department, the General Motors Acceptance Corporation and the Johns-Manville Company. All of these agencies are making loans upon what is termed

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"producer credit," that is the ability to repay instalments out of income or earnings. While there is no existing form of loan in use exactly the same as the government now proposes to guarantee, there is a certain amount of similarity. For example, the National City Bank makes loans on personal credit without security, and has had a loss ratio of less than 1% throughout the depression. The credit standards used for these loans are very similar to those which will be employed for the government loans, but it is admitted that the loss ratio will be higher to the government, principally because it is proposed to make loans for as long a period as five years, while the bank loans are limited to one year. While this will result in smaller monthly payments, yet the very considerable lengthening of time brings in many other factors, as for example, a borrower's chance of keeping a job over a period of five years is enormously less than his chance of keeping it for one year.

The information given to Congress by the National City Bank also discloses an interesting fact, namely, that the experience of the bank indicates that the average American family undergoes a financial crisis at intervals of about three years, arising from illness, loss of employment or some such factor, and it was the opinion of the bank's officials therefore that loans averaging more than three years presented a much greater hazard of loss, and introduced a factor which would really render previous lending experience useless as a guide to an estimate of the loss ratio. Present forms of lending also have the advantage of a high rate of interest to compensate for losses.

All these factors have been considered, resulting in the plan to guarantee against a 20% loss ratio, and it seems fairly probable that this percentage will, as it was intended, appear to be so unnecessarily high that institutions will be induced to regard the security as more than sufficient, and make the loans freely.

Persons interested in obtaining these loans must, therefore, understand the primary credit requirements, first, that the applicant must be a person of good reputation in his community as far as paying his debts is concerned, and that he must have a definite income or salary out of which he can reasonably afford to allot 25% for repayment. Other individual factors will determine the size of the loan to be made and the length of time, and the consequent amount of the monthly instalments. No definite fixed rules can be made on these points, but undoubtedly certain principles will be evolved which will be applied to each case in making the credit investigation.

It must be clearly understood that these loans are not intended to relieve the needy. They are only for such people as already can afford to buy automobiles and refrigerators, and so on, on the instalment plan, and are based on the belief that these people will be eager to buy repairs to their homes or other buildings by the use of this part of their incomes which is available for instalment buying.

Title II of the Act sets up a plan of mortgage insurance by creating a mutual insurance fund, supported by premiums at a rate not exceeding one per cent per annum.

The most interesting point to be noted is that the administration is endeavoring to change the mortgage structure into a new form not hitherto in use to any great extent in this country. This is the amortized mortgage payable in monthly instalments over a long term. It is claimed that our present system of short term mortgages is outworn and cannot be revived from its present stagnation.

All mortgages to be issued under the Act must be of the amortized kind and contain other specific provisions required by the Act, and are to run for not more than twenty years.

The mortgages are limited to $16,000 each, and cannot be for more than 80% of the appraised value as it exists at the time the mortgage is made. It should be noted that this may result in lower appraisals than those made under the Home Owners' Loan Act, where the appraisal is not expressly thus limited.

The rate of interest upon the insured mortgages is limited to 5%, except that it may be 6% in areas approved by the Federal Housing Administrator.

An insurance premium of 1% is considered sufficiently high to avoid all possible loss, so that in theory this title of the Act will not cost the government anything.

There is no limitation as to the purposes for which the insured mortgages may be made, and they will therefore be available to refinance existing mortgages in cases which are not sufficiently distressed to qualify for a HOLC loan, and they will also be available for new home construction in areas where there is a reasonable economic demand. The property eligible is limited to land upon which there is erected a dwelling for not more than four families used in whole or in part for residential purposes. There is no requirement, as under the Home Owners' Loan Act, that the owner must live in the premises.

Therefore, these loans will be available either to refinance or to construct buildings with apartments over stores, or small apartment houses, and it would be quite possible to utilize a loan to change present single dwellings into not more than four apartments.

When and where any of these loans will be available it is impossible to predict at this time. The whole operation of this title depends upon whether the method of insurance will be considered of sufficient strength to private lending agencies to induce them to reopen their coffers for mortgage investments.

It is undoubtedly true that from an economic standpoint the guarantee of mortgages by a mutual form of insurance is the only sound method. Guarantee by private capital has been proved a total failure through the experience of the past few years, and it cannot be denied that in enacting this title Congress has offered to the country a greatly improved and much sounder plan for the mortgage structure of the nation than has hitherto existed.

The plan forces nothing upon the country, and its benefits may be accepted or rejected. The money lenders are now an ultra-conservative class, and it may be some time before they can be persuaded to accept a new plan so comprehensive. Undoubtedly many of them will hold out indefinitely, and it is therefore not to be expected that these mortgage loans will be available from more than a small proportion of the existing institutions.

In addition to these mortgages the administration is also authorized to insure first mortgages held by federal or state instrumentalities, private

limited dividend corporations or municipal corporate instrumentalities formed for the purpose of low cost housing projects. The total of the mortgages which may be insured is $10,000,000 on any one project.

The limitations above stated shut out all private development projects, and there is no intention of Congress to encourage speculative building operations. It will throughout be the settled policy in administering the act to be very cautious in insuring loans for new building. Congress is satisfied that there exists no widespread demand or economic need for building new homes, and that such construction is only justified at the present time in areas where the pressure of population has created an actual economic need for new housing.

Title III of the Act authorizes the incorporation of private lending agencies to be known as national mortgage associations.

The apparent purpose of this provision is to provide facilities for mortgage lending to compensate for any lack of willingness on the part of private capital to return directly to this field.

Each of these corporations must have a paid up capital of not less than $5,000,000 before beginning business, and may issue bonds to an amount of ten times the capital stock.

The activities of these corporations are limited to the purchase and sale of first mortgages on real estate which do not exceed 80% of the appraised value.

The administration contemplates the organization of a few of these corporations, the theory being that they will be able to gather capital in parts of the country where it is plentiful and lend it in areas where it is scarce.

Lending money and dealing in mortgages is a private business and congress has not hitherto attempted to authorize the organization of corporations for private business under federal laws. It is rather difficult to discover the provision of the constitution which authorizes the federal government to create such corporations, and it may well be that this title of the Act will be held unconstitutional.

If the Act shall survive attack, any of these associations which are incorporated may prove useful in two ways. Private capital may be induced to become available for mortgage loans by investment in the stocks and bonds of these associations, while it might be unwilling to make direct mortgage investments. The existence of the association may also tend to revive activity in mortgage lending by institutions which might not be inclined to return to this field, through the fact that the associations, if left to themselves, would be able to absorb all the mortgage business of the country, which other institutions might view with great dissatisfaction upon any upturn in the real estate market.

Title IV of the Act creates the Federal Loan and Savings Corporation, for the purpose of insuring the accounts of federal savings and loan associations, with power also to insure the accounts of private building and loan associations, homestead associations and cooperative banks organized under state laws. The provisions of this title are detailed and complicated, but the points of interest may be noted.

Each insured institution will pay an annual premium of ¼ of 1% until a 5% reserve fund is accumulated, and the same premium thereafter whenever the reserve falls below that percentage.

Additional premiums may be assessed to pay losses, so that the corporation is really a mutual insurance association.

In case an insured institution defaults in its accounts, the insurance corporation may discharge its obligation either by transferring to the owner of the account a new insured account of the same amount in an institution not in default or, at the option of the owner, pay to him 10% of his account in cash at once, 50% of the remainder within one year, and the balance within three years.

The effect of this title upon building and loan associations which are at present unable to pay out, will depend upon their actual financial condition. To those which are sound, and only frozen because of the rigidity of the real estate market, it may restore liquidity.

Title V contains miscellaneous amendments of a number of existing laws, none of which are of immediate general interest except the amendments by which the amount of the authorized bonds of the Home Owners' Loan Corporation is increased from $2,000,000,000 to $3,000 000,000, and the amount allotted to rehabilitation loans is increased from $200,000,000 to $300,000,000.

The National Housing Act does not encroach upon nor overlap the provisions of the Home Owners' Loan Act in any respect. Entirely different classes of persons are affected. The general distinction is that mortgage loans under the latter Act can only be made to persons in actual distress, and under the National Housing Act only to those who possess actual credit, or, in the case of mortgages, are not distressed so as to be eligible for a Home Owners' Loan Corporation loan.

This distinction must be carefully noted in respect to repair and rehabilitation loans. If you are in distress and can obtain an HOLC mortgage you may also be able to secure a rehabilitation loan by additional mortgage, if there is sufficient equity in the property. If you are not in distress you can obtain a similar loan under the National Housing Act but only if you can meet the personal credit requirements.

As to mortgage loans, if you cannot qualify under the HOLC requirements, the National Housing Act has endeavored to enable you to refinance your existing mortgage with one of the new type amortized mortgages obtained from some private lending agency, and likewise to enable you to finance the building of a new home by a similar mortgage, if you can yourself provide an equity of 20%.

The recent amendment authorizing rehabilitation loans caused the HOLC to be swamped with applications from persons not eligible, and continued and clear explanation will now be required to prevent the Federal loan plans from becoming "confusion worse confounded."

As one object of the American Bar Association Journal is to afford a forum for the free expression of members of the bar on matters of importance, and as the widest range of opinion is necessary in order that different aspects of such matters may be presented, the editors of this Journal assume no responsibility for the opinions in signed articles, except to the extent of expressing the view, by the fact of publication, that the subject treated is one which merits attention.

MR. AND MRS. HADDOCK

Question of Divorce Jurisdiction Seems to Be Considered One of Great Difficulty and Confusion—This Article Is Written in an Attempt to Find a Theory Which Will Clarify the Understanding of the Supreme Court Decisions on the Subject and Effect a Logical Reconciliation — In Rem and in Personam Theories — Strange Results of Extension of Doctrine of Early Cases, etc.

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IT WAS twenty-eight years ago on April 12th that Mr. and Mrs. Haddock moved to our town. From the outset they were extremely unpopular. They built a house of what appeared to be novel design and seemed to conduct themselves in strange ways. With their nearest neighbors the Athertons, who had moved there some time before, they could not get along at all. And Mr. and Mrs. Andrews and Mrs. Cheever and Mr. Wilson, who had come with the Athertons, were almost as hostile. The truth is that they were socially ostracized, with their novel house and strange ways, and we thought that they would soon be forced to move. But they haven't. Perhaps they had no more hospitable place to which to go. For instance Mr. and Mrs. Ditson, who live in another town and who knew the Haddocks before they came, were openly hostile, and in fact are so to this day. But in spite of this, the Haddocks have stayed here and we have all had to live together. Perhaps age has softened all of us or perhaps propinquity has enabled each to recognize the best qualities in the other, but, whatever the reason, the truth is that we no longer fight and wrangle. We no longer feel that their house is of such novel design, for there are many more like it now, nor do we feel that their ways are so strange, for there are many others who live the same manner of life. While there are some like the Ditsons who live in other towns and will not even speak to the Haddocks, those of us here first learned to understand them and then to like them. In fact, they are coming over for bridge tonight along with Mr. and Mrs. Atherton, Mr. and Mrs. Andrews, Mrs. Cheever and Mr. Wilson.

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The question of divorce jurisdiction seems to be considered one of great difficulty and confusion. While the more recent cases as a rule do not go deeply into the theory of the matter, not infrequently one sees articles and hears discussions stressing the complexity of the problem and ending with a statement to the effect that the Supreme Court of the United States should declare whether a divorce suit is one *in personam* or *in rem*. One may perhaps be permitted to wonder whether it should do any such thing, whether it feels even that it has the right to do any such thing let alone the duty. It seems possible that the Supreme Court may think it quite beyond its province to so declare, which admittedly would be an excellent explanation of its inaction in that regard. This article is written in an attempt to clarify the understanding of the decisions of the Supreme Court on this subject and has for its object a reconciliation of the various cases decided by that body. It merely seeks to find a theory which will explain the Supreme Court decisions. The cases used are as few as possible and for the most part so well known that citations are superfluous, though they are inserted as a matter of form.

The *Le Mesurier* case (*Le Mesurier v. Le Mesurier*, 1895 Appeal Cases 517) is a convenient case with which to start because it so clearly proceeds upon the *in rem* theory and because it is familiar to every student of the subject. It holds that domicil "for the time being" of the married pair determines the jurisdiction for divorce.

Three years later the *Armytage* case (*Armytage v. Armytage*, 1898 Probate Division 178) was decided. It also is convenient to use for the reason that it proceeds so exclusively on the *in personam* theory and is also very well known. It holds that residence of the parties with personal service upon the defendant is sufficient to support a decree of separation.

It is very apparent that the doctrine of these cases logically extended leads to strange results. Suppose A and B are married and living in New Jersey. They have three children and own a home. A is a mining engineer. He is sent to Nevada to develop mining property for the company for which he works. The husband and wife talk the matter over and decide to put the children in boarding school in order that the wife may accompany her husband on the business trip. The domicil of the couple is New Jersey and never changes. They have no thought of divorce or separation when they leave New Jersey and there is no question of collusion or fraud imputed. They go to Nevada and make Reno their headquarters and have been there three months when B, the wife, discovers that A, the husband, has been guilty of adultery and sues and obtains a decree for divorce, the Reno statute for residence being six weeks. Obviously this decree would not receive extra-territorial recognition under the *Le Mesurier* case logically extended. If in the circumstances above described the wife had instead sued for separation and had obtained a decree, that decree would receive extra-territorial recognition under the doctrine of the *Armytage* case.

If instead of going to Nevada with her husband, B had stayed at home with the children and A had gone to Nevada, making his headquarters in Reno, and if B had then learned and received competent evidence of adultery by A in Reno and had sued in New Jersey and obtained a decree on service by publication against A still in Nevada, the divorce decree if such had been obtained would be entitled to recognition out of the state under a logical extension of the doctrine of the *Le Mesurier* case, while the separation decree if such had

been granted would be invalid out of the state under a logical extension of the doctrine of the *Armytage* case.

This is a rather strange situation, particularly so in the second hypothetical case for there the separation decree, which is the lesser breach of the marital relationship from a sociological standpoint, is not valid out of the state, while the divorce decree which is the greater breach from that viewpoint is valid out of the state on the same set of facts. The cases are not so hypothetical after all. For instance, the courts of Connecticut have refused to recognize a foreign decree for separation granted at the domicile of the plaintiff without personal service or appearance (Pettis v. Pettis, 91 Conn. 608, 101 A. 13) and have recognized a foreign decree for divorce granted in the same circumstances (Gildersleeve v. Gildersleeve, 88 Conn. 689, 92 A. 684).

Of course, such a situation immediately arouses one's curiosity and one asks the question, what is so vitally important about domicile, what magic does it work? The answer is obvious and elementary, namely, that marriage is a contract which establishes a status; that such status is one involving two people and not one person; that the divorce decree disrupts the status and leaves the two people capable of marrying again, in the absence of some express *in personam* prohibition against it; that the separation decree, while it may affect the personal relationship of the parties, does not disrupt this status; that the status then is to be considered as a *res;* and that where an action has for its object the destruction of that *res* it is *in rem,* whereas when it has for its object merely the adjustment of personal relations without a disruption of the *res* it is not *in rem* and therefore must be *in personam.*

So far the matter is very simple. But the *res* here is not a tangible *res* that court and counsel can see and touch. It is intangible, and some device had to be manufactured whereby the *situs* of the *res* could be determined, since the *situs* was going to determine jurisdiction *in rem.* "Domicil" was hit upon by the courts of England and of the United States as being evidence of the situs of the *res,* and there is no objection to that on principle. That word of elusive definition was already pretty well loaded with determinative duties but it seemed capable of assuming others and it came to be regarded not only as evidence of the *situs* of the *res* but as exclusive evidence of such *situs.* That again was a simple and logical step. The State Courts talked of the status of their citizens and treated that status as a thing. With domicilan *a fortiori* test of state citizenship it was quite natural to select it as the test of *situs* of the status *res.* It was in fact a manner of use of the Continental citizenship test to support the English domicil test.

The difficulty came when the law began to admit that a wife may have a separate domicil of her own. There is probably no objection to the separate domicil theory *per se.* No doubt it works for social justice in many respects. But when it is introduced into the field of divorce jurisdiction it becomes apparent that trouble has entered with it. The question immediately occurs, what does the separate domicil theory do to this *res?* Since the status is that of two persons and not one, does the wife upon taking a separate domicil take half of the *res* with her and leave half with the husband, or does it all stay where it last was, or do they both have a sort of tenancy by entirety in the *res* which would construe it as having a *situs* at the domicil of both?

And so we come to the case of *Haddock v. Haddock* (201 U. S. 562) which holds that a decree for divorce rendered in a jurisdiction where the plaintiff is domiciled but the defendant is not and without personal service upon or appearance by the defendant within the state is not entitled to obligatory extra-jurisdictional recognition under the Constitution. The case implies or states by way of *dictum* that if both parties had been domiciled in the jurisdiction in which the decree was rendered it would have been entitled under the Constitution to obligatory recognition outside of the state, or if the plaintiff had been domiciled within the jurisdiction in which the decree was rendered and the defendant had not but had been served personally within the jurisdiction or had appeared, the decree would have been entitled to obligatory recognition outside of that state.

The opinion discusses the cases of *Atherton v. Atherton* (181 U. S. 155) and *Cheever v. Wilson* (9 Wallace 108) and reaches the following preliminary conclusions, p. 572:

> "Coming to apply these settled propositions to the case before us three things are beyond dispute: *a.* In view of the authority which government possesses over the marriage relation, no question can arise on this record concerning the right of the State of Connecticut within its borders to give effect to the decree of divorce rendered in favor of the husband by the courts of Connecticut, he being at the time when the decree was rendered domiciled in that State. *b.* As New York was the domicil of the wife and the domicil of matrimony, from which the husband fled in disregard of his duty, it clearly results from the sixth proposition that the domicil of the wife continued in New York. *c.* As then there can be no question that the wife was not constructively present in Connecticut by virtue of a matrimonial domicil in that State, and was not there individually domiciled and did not appear in the divorce cause, and was only constructively served with notice of the pendancy of that action, it is apparent that the Connecticut court did not acquire jurisdiction over the wife within the fifth and seventh propositions; that is, did not acquire such jurisdiction by virtue of the domicil of the wife within the State or as the result of personal service upon her within its borders."

It will be noticed that the opinion of the court speaks of "jurisdiction by virtue of the domicil of the wife within the State or as the result of personal service upon her within its borders." A little later it speaks of "the rule limiting the authority of a State to persons within its jurisdiction," p. 573, and of the situation where "there was no jurisdiction, either of the subject matter or of the person of the defendant," p. 573. Still later the opinion uses the language: "It causes the full faith and credit clause of the Constitution to operate upon decrees of divorce in the respective States just as that clause operates upon other rights, that is, it compels all the States to recognize and enforce a judgment of divorce rendered in other States where both parties were subject to the jurisdiction of the State in which the decree was rendered . . .", p. 581. It, therefore, becomes apparent that the Supreme Court is at least considering and discussing jurisdiction both *in personam* and *in rem* with regard to the divorce suit; in other words, it is discussing jurisdiction in accordance with the principles of common law jurisprudence as laid down in *Pennoyer v. Neff,* 95 U. S. 714.

Of course, on this basis the *Haddock* case would be sound on principle either on the *in rem* theory or the *in personam* theory because, if domicil is considered as exclusive evidence of the *situs* of the *res* and if the defendant is domiciled in a state other than that rendering the decree with no presumption of constructive domicil operating against her, the *res* in its entirety is obviously not within the jurisdiction of the court. Clearly there is no personal jurisdiction without personal service or appearance. The dictum of the case

to the effect that if both parties are domiciled within the jurisdiction, the decree will be entitled to obligatory recognition elsewhere appears entirely sound on the *in rem* theory, and the further dictum of the case, which is the decision of *Cheever v. Wilson,* that where the plaintiff is domiciled within the jurisdiction of the court renderng the decree but the defendant is not the decree will be entitled to extra-territorial recognition if the defendant is served personally within the jurisdiction of the court or appears, also seems entirely sound on the *in personam* theory. The *Atherton* case very apparently is decided upon the *in rem* theory, holding as it does that a divorce decree rendered by a court having jurisdiction of the matrimonial domicil of the parties, that is, the last place in which they resided together, is entitled to obligatory extra-territorial recognition, regardless of personal service or appearance, where the husband remains domiciled and the wife deserts.

The case of *Andrews v. Andrews,* 188 U. S. 14, holding as it does that a defective jurisdiction by reason of a foreign domicil of both parties cannot be cured by the residence of the plaintiff at the forum and the appearance of the defendant, seems at first to stand for the proposition that the suit for divorce must be considered a suit *in rem.* It would seem that if the action were personal in nature the residence of the plaintiff with personal service on the defendant would be sufficient, that if these are insufficient it cannot be *in personam* and that it therefore must be *in rem.* Frankly, one is driven to this conclusion unless the decision can be based upon the ground of fraud against the state of domicil, that is, the state of which a party is a citizen.

If the foregoing is true, the above mentioned cases begin to smooth out to a considerable degree. One may quarrel with the decision in the *Haddock* case or in the *Atherton* case but one is forced to admit that the Supreme Court thought that it was dealing with a factual situation in the *Haddock* case in which there was no jurisdiction either *in rem* or *in personam,* and that it thought that it was dealing in the *Atherton* case with a factual situation in which there was a jurisdiction *in rem.* On principle, therefore, the cases are entirely reconcilable. As decisions on their facts they will be dealt with later.

Concerning the *Andrews* case, an examination of *Cheever v. Wilson* will probably help us to discover the real ground of decision and to fit the case into the general scheme. *Cheever v. Wilson* held that a divorce decree is entitled to obligatory extra-territorial recognition where the plaintiff is domiciled within the jurisdiction and the defendant is personally served or appears although not domiciled there. In this case the petition alleged a "bona fide residence" by the plaintiff. The opinion states, 9 Wallace 123, that the court rendering the decree "had jurisdiction of the parties and the subject matter." It cites *Ditson v. Ditson,* 4 R. I. 87, for the proposition that:

> "The proceeding for a divorce may be instituted where the wife has her domicil. The place of the marriage, of the offense, and the domicil of the husband are of no consequence." (9 Wallace 124.)

Obviously, the case can no more be supported on the *in rem* theory than *Haddock v. Haddock* could have been expected to hold that there was in that case a real jurisdiction *in rem.* In both cases one-half of the matrimonial *res* was absent from the jurisdiction by reason of the fact that the defendant was domiciled elsewhere, domicil of both parties being considered the exclusive evidence of the *situs* of the *res.* It can, of course, be supported on the *in personam* theory about which there is no difficulty except this, that one wonders why in this particular type of action domicil is necessary on the part of the plaintiff rather than mere residence and what it is about the divorce suit which peculiarly requires such a situation in order that the *in personam* jurisdiction may be effective. The answer or at least an answer seems to be that domicil of the plaintiff is required not on any *in rem* theory or any theory that the plaintiff has a tenancy by entirety in this *res,* but in order to exclude the element of fraud from divorce cases.

It is so easy when one has come from an examination of decisions which have been rendered on an *in rem* theory to plunge on into *Cheever v. Wilson* still intent upon considering domicil solely as exclusive evidence of the *situs* of the *res.* Of course, it is that. But domicil carries many other burdens as well and one of them is its determinative effect upon state citizenship. If in deciding these cases which determine marital status it becomes wise as a matter of public policy to exclude at the outset fraud against a state of which a plaintiff is a citizen, may it not well be that the court is requiring domicil on the part of the plaintiff in the *in personam* suit rather than residence in order to be certain at the outset that no such fraud is going to be perpetrated. Of course in the cases of *in rem* jurisdiction, with domicil considered as exclusive evidence of the *situs* of the *res,* there is no difficulty, because the plaintiff must be domiciled for another reason, that is, for jurisdictional purposes. If, in suits proceeding upon either theory, the plaintiff is domiciled within the jurisdiction, he is a citizen of that state, and since he is a citizen of that state he cannot be a citizen of another state and, therefore, in his suit he cannot be working a fraud against any other state. This theory, it is submitted, is not necessary to explain and justify *Cheever v. Wilson* upon jurisdictional grounds. That case seems to stand squarely upon the *in personam* basis. It is merely a theory evolved to explain the peculiar requirements of domicil in a plaintiff. But when we come to the case of *Andrews v. Andrews* it may be the sound explanation. It seems clear that in that case the fact that neither party was domiciled within the jurisdiction of the court was considered as rendering the decree one not entitled to obligatory recognition elsewhere because of fraud committed against the state of domicil. The court says, 188 U. S. 14, 37-38:

> "When the principles which we have above demonstrated by reason and authority are applied to the question in hand, its solution is free from difficulty. As the State of Massachusetts had exclusive jurisdiction over its citizens concerning the marriage tie and its dissolution, and consequently the authority to prohibit them from perpetrating a fraud upon the law of their domicil by temporarily sojourning in another State, and there, without acquiring a *bona fide* domicil, procuring a decree of divorce, it follows that the South Dakota decree relied upon was rendered by a court without jurisdiction, and hence the due faith and credit clause of the Constitution of the United States did not require the enforcement of such decree in the State of Massachusetts against the public policy of that State as expressed in its statutes. Indeed, this application of the general principle is not open to dispute, since it has been directly sustained by decisions of this court. Bell v. Bell, 181 U. S. 175; Streitwolf v. Streitwolf, 181 U. S. 179."

That this explanation of the domicil requirement in *Andrews v. Andrews* and *Cheever v. Wilson* is not entirely fanciful is borne out by the opinion of the Supreme Court in *Haddock v. Haddock.* It says, p. 583:

> "As respects the decisions of this court. We at once treat as inapposite, and therefore unnecessary to be here specially re-

viewed, those holding, *a*, that where the domicil of a plaintiff in a divorce cause is in the state where the suit was brought, and the defendant appears and defends, as both parties are before the court, there is power to render a decree of divorce which will be entitled in other states to recognition under the full faith and credit clause *(Cheever v. Wilson, supra); b*, that, as distinguished from legal domicil, mere residence within a particular State of the plaintiff in a divorce cause brought in a court of such State is not sufficient to confer jurisdiction upon such court to dissolve the marriage relation existing between the plaintiff and a non-resident defendant. *Andrews v. Andrews*, 188 U. S. 14; *Streitwolf v. Streitwolf*, 181 U. S. 179; *Bell v. Bell*, 181 U. S. 175."

If this explanation is sound the difficulty and confusion existing by reason of these cases appears to be entirely removed. The *Haddock* case may then be considered to have been decided on the ground that there was no jurisdiction either *in personam* or *in rem;* the *Atherton* case on the ground that there was jurisdiction *in rem;* the *Andrews* case on the ground that domicil as evidence of the absence of fraud was not present; and the *Cheever* case on the ground that there was jurisdiction *in personam* with domicil established as evidence of the absence of fraud.

May it not be, therefore, that the attitude of the Supreme Court has been as follows? May it not be that the Supreme Court has impliedly said substantially this: The original states were sovereign states long before the United States of America was established. As such sovereign states they had jurisdiction in matrimonial actions. When they set up the new political entity called the United States of America by the joint cession of certain of their powers to that entity, they did not cede their jurisdiction over matrimonial actions. Such jurisdiction, therefore, remains with them, and also with those states subsequently admitted. In so far as the determination within their own boundaries of the status of their own citizens is concerned, they are absolutely and completely supreme. What grounds for divorce they may use and what theory of jurisdiction they may adopt are exclusively their business and not ours. The only manner in which we might be interested would be through the due process clause of the Fourteenth Amendment and the standard of treatment which it requires for persons within the United States. But we have stated in *Pennoyer v. Neff* that this standard of conduct does not apply to proceedings to determine the civil status and capacity of citizens of a state within its own territory. The states are, therefore, free to do as they choose in that regard. But when obligatory extra-territorial recognition is sought for one of their decrees of divorce, under the full faith and credit clause, we do become interested. In fact, it is well established that the court of the second state, in which and through which extra-territorial effect is sought for the decree of divorce may examine into the question of jurisdiction in the court which renders the decree, and here too we will examine into that question as a prerequisite to rendering a decree for obligatory recognition, and in addition the question of fraud. This we do under the Constitution, not because we are interested in what may be the ground of divorce or in the precise manner in which jurisdiction was acquired, but because we wish to know whether there was any jurisdiction at all. As in other cases, all we are interested in is a true jurisdiction in accordance with the principles of common law jurisprudence. When a case comes to us in admiralty, we are not interested in inquiring why the plaintiff sued *in personam* rather than resort to a libel *in rem* or why he proceeded *in rem* against the vessel rather than sue *in personam*. We are no more interested in the type of jurisdiction that was acquired in a divorce suit than we are in the type which was acquired in an admiralty suit. All that we are concerned with in the divorce suit is whether there was a real jurisdiction of any kind not destroyed by fraud. If there was, we will decree obligatory recognition outside of the state in which the judgment was rendered and if there was not we will not so decree.

Such an explanation makes the position of the Supreme Court simple and clear, and it seems sound. It obviates all the difficulties in these cases of reconciliation and effectively answers the suggestion that the Supreme Court should definitely declare whether the suit for divorce is a proceeding *in rem* or *in personam*.

Only one point remains of any confusion and difficulty and it is not a matter of reconciliation. It involves the point raised in the dissenting opinion in the *Haddock* case, namely, the question of desertion by one of the parties and the necessity for going into the merits of the case in order to determine jurisdiction. Perhaps it will help to construct the answer to consider the *Haddock* and the *Atherton* cases as decisions. It will be remembered that in the *Atherton* case the decree was held to be entitled to obligatory extra-territorial recognition where it was rendered at the matrimonial domicil, with the plaintiff still domiciled there, against a deserting wife who was not so domiciled and against whom personal service was not had or from whom personal appearance was not received. In the *Haddock* case, the decree rendered at the domicil of a deserting husband was held to be not entitled to obligatory extra-territorial recognition against the wife who was still domiciled at the matrimonial domicil and who had not appeared or been personally served within the jurisdiction. The dissenting opinion of Mr. Justice Holmes in the *Haddock* case apparently takes the position that the cases are undistinguishable and that if jurisdiction is going to be made to depend upon the facts of desertion it will be necessary to try the case on the merits before the jurisdiction can be determined.

This matter has also been one of confusion and difficulty in the law of England. Between the years 1898 and 1926 it seemed clear that in England a wife might maintain a separate domicil for the purpose of divorce against a deserting husband. The courts apparently considered this rule, whenever it was not placed squarely on grounds of public policy, not as an exception to the general rule that the domicil of the wife is presumed to follow that of the husband, but as the result of a personal estoppel worked against the husband because of his wrongdoing. The rule of the *Le Mesurier* case, in which Lord Watson had stated in 1895 that "the domicil for the time being of the married pair affords the true test of jurisdiction to dissolve their marriage," had been accepted without question, and, as late as 1921 was affirmed by the House of Lords in *Lord Advocate v. Jaffrey*, (1921) 1 A.C. 146, with Lord Haldane stating that: "Since *Le Mesurier v. Le Mesurier* nothing short of a full juridical domicil within its jurisdiction can justify a British court in pronouncing a decree of divorce," p. 152.

Yet in 1898, three years after the *Le Mesurier* case was decided, Lord Gorell, then Sir Gorell Barnes, spoke by way of dictum in the *Armytage* case of the instance of desertion by the husband or justified departure by the wife and the acquisition by her of a separate domicil on the ground that "he cannot be allowed to assert for the purposes of the suit that he had ceased to be domiciled in this country," (1898) P.D. 178, 185. And the same judge, sitting ten years later as a member of the Court of Appeal, stated in *Ogden v. Ogden*, (1908) P.D. 46, that a wife so situated might, con-

sistently with principle, be allowed to obtain relief in the court of her original domicil. In this case the Court of Appeal said, p. 78:

> "Without doubt it has now been clearly established that the Courts of this country, wherever a marriage has been celebrated, recognize a decree of dissolution made by a proper tribunal of the country in which the parties are domiciled as universally binding and putting an end to the marriage, and it is no real exception to this principle that, in cases where a wife has been deserted in the country of the domicil by her husband in circumstances entitling her to sue for divorce, it has been held that she might sue in the Courts of the country of the domicil notwithstanding the fact that the husband has left the country and might possibly have done so with the intention of acquiring a domicil in another country. The decree in such a case is justified, either by considering that the husband cannot be heard to say that he has changed his domicil, or, as some have thought, that the wife must ex necessitate be entitled to treat the country of the previous matrimonial domicil as still being the country of her domicil, and to require its Courts to do justice to her, because otherwise it would be impossible for a wife so situated to obtain a decree, as the respondent might keep changing his abode from place to place, asserting that he had abandoned his original domicil, and any domicil with which it were sought to fix him."

And so it seemed clear under these decisions that even in England a wife might maintain a separate domicil for the purpose of divorce against a deserting husband, and that the rule rested either upon grounds of public policy or a doctrine of personal estoppel. However in 1926 the Judicial Committee of the Privy Council handed down a decision in *Attorney-General for Alberta v. Cook*, (1926) A.C. 444, which gave cause for wonder as to whether this rule of separate domicil was law. And in 1928 the Probate Division rendered a decision in *H. v. H.*, (1928) P. 206, which caused some to declare that this doctrine had been definitely overruled. Such a statement seems too strong. The doctrine appears still to be alive, though in a somewhat crippled state by reason of the fact that these cases unquestionably modified the grounds on which it had rested for almost thirty years, and in so doing had as a practical matter rendered it almost inoperative. The cases are interesting and speak for themselves.

In the *Cook* case the questions involved were "whether a wife judicially separated from her husband may acquire a domicil of choice apart from the husband, and whether in the Courts of such her domicil she may obtain a decree of divorce upon grounds sufficient under the law there in force, although the husband is not there domiciled," p. 447. The court, speaking through Lord Merrivale, expressly refrained from passing on the question "not directly raised upon this appeal—namely, whether without express legislative sanction, Courts having jurisdiction in divorce may by estoppel or like device ensure that one of the spouses shall not resort to a jurisdiction other than that in which both were domiciled, and invoke its powers, on the ground of domicil newly acquired within its authority, to change the status of the spouse left resident in the original place of domicil. It is not necessary on this occasion to deal specifically with that question," pp. 456-457. The Court held that the wife had not acquired a separate domicil, and stated that: "In so far as British tribunals are concerned it is a requisite of the jurisdiction to dissolve marriage that the defendant in the suit shall be domiciled within the jurisdiction," p. 465. Yet, in spite of the fact that the court expressly reserved the question now being considered, the wife in this case had obtained a separation decree (p. 447), and the trial judge, Walsh, J., had "held at the hearing, that if there was jurisdiction in the Court to decree a divorce of this marriage it should be decreed upon grounds of cruelty, desertion (*sic*) and adultery," p. 448.

In the *H. v. H.* case the domicil of origin of the parties was English. They had been married in England in 1915. In 1921 a decree of judicial separation *on the ground of desertion* was pronounced at the instance of the wife. In 1928 she sued for divorce on the ground of adultery alleged to have been committed in 1927 and 1928. The question presented was "whether there is a rule of law governing the jurisdiction in divorce whereby as between parties originally of English domicil a husband judicially separated from his wife, and alleged to be afterwards guilty of adultery, is disentitled to allege (*sic*) in proceedings for dissolution of marriage that since the decree of judicial separation he has become domiciled elsewhere," pp. 209-210.

The court, also speaking through Lord Merrivale, examined the above-mentioned *dicta* of the *Armytage* and *Ogden* cases and reached the conclusion that "they do not purport to lay down a rule of law. They purport rather to state the practice of the Court" (p. 212), and "as a substantive proposition of English law the alleged rule cannot be sustained," p. 213. It then considered whether "the principle of estoppel is available" (p. 213), and reached the conclusion that: "The suggestion that a respondent should be met by an estoppel in limine in the matter of jurisdiction when a petition alleges a state of facts such as is forecasted in *Ogden v. Ogden* is a proposal to resort to a legal fiction and not an appeal to an estoppel in the true sense," pp. 213, 214. After stating that "estoppel . . . is a rule of evidence" and that "the statute which established the jurisdiction in divorce directed that the Court should proceed upon the rules of evidence in force in the courts of common law," Lord Merrivale declares that: "The rule of evidence which produces estoppel operates in the trial of issues as to domicil in this Court to the same extent as in other proceedings in the High Court and not otherwise." This meant that: "An issue of domicil, therefore, is not to be prejudged so as to give effect to a presumption of law, but is to be duly tried to determine the relevant matters of fact. It may even be that the effect in point of fact of a proved desire to avoid a jurisdiction may have to be weighed together with other relevant facts, as was done with interesting results by Neville, J. in the Chancery Division in a case of *Drexel v. Drexel*, (1916) 1 Ch. 251," p. 214.

It was held that "the respondent's allegation, by way of objection to the jurisdiction of the Court, that he is domiciled in France must be tried like any other issue. Upon the trial the Court will determine whether the respondent has taken up his residence in France and is in truth resident there with that intention which combined with residence results in a change of domicil. Then, and particularly on the last mentioned topic, the matters which gave rise to the pronouncements in *Armytage v. Armytage* and *Ogden v. Ogden* will have whatever may be their due weight," pp. 214, 215.

In the case of *Drexel v. Drexel* mentioned by the Court in the *H. v. H.* case, *supra*, suit was brought to enforce a separation agreement by a wife resident in England against a husband held to be resident and domiciled in France, such domicil having been acquired "solely for the purpose of obtaining a dissolution of the marriage tie," p. 259. The plaintiff obtained leave "to serve notice of the writ on the defendant in Paris, where he was then living, on the ground that he was

ordinarily resident in England," p. 254. Apparently this was done. The defendant entered a conditional appearance. The Court took jurisdiction, saying, p. 260: "I think Mrs. Drexel being in England had a right to have payment in England and to issue her writ here, and that the order made for service of notice upon the defendant in Paris was right. I think the case comes within r. 1 (e) of Order XI.—in other words, that under the terms of the agreement the contract to pay was to be performed within the jurisdiction of this Court."

The opinion of Neville, J. seems singularly unhelpful. It discusses no previous cases, and in fact mentions no authority of any kind except "Co. Litt. 210 b" for the proposition that "the debtor must seek his creditor and must pay him," p. 260. The case would scarcely seem to merit exaltation as a model for the disposition of the socially important and theoretically beautiful question here under discussion.

The English law consequently seems to be in this regard: the domicil of a deserted wife continues that of her husband; a deserting husband may acquire a new domicil and if so that of his wife will follow; that this is a question of fact to be tried as such; that in its trial evidence will be received concerning the deserting husband's possible "desire" or motive of attempting to change his domicil for the purpose of avoiding jurisdiction in a divorce suit, such motive being considered evidence of the intention which is a requisite element of the factual condition of domicil. A door is still open, but a very small door, extremely difficult of access as a practical matter for a woman burdened with disabilities which can only be removed within.

Of course the doctrine that, as a result of a conclusive presumption or rule of substantive law, a deserting husband is considered to be *incapable* of acquiring a new domicil is open to the obvious objection that it plays havoc with the factual condition and with domicil as a test for other matters such as taxation or the administration of an estate. It is submitted that it was not necessary to say that the deserting husband could not acquire a separate domicil, and thus to do violence to the domicil theory, in order to explain the *Armytage* and *Ogden dicta*. He may do so undoubtedly for taxing purposes or for the administration of his estate. He may undoubtedly take his portion of the martial status *res* with him. Suppose his wife subsequently becomes domiciled in his state without his knowledge. He has done nothing more at all. Previously he had no domicil for divorce, but after his wife moved to that state without the present intention of going elsewhere, that is, became domiciled there, he did have a domicil for divorce. It is obvious that it was her act which worked the change, with the result that the whole *res* is now in the one jurisdiction. This case shows, it is submitted, that the explanation of *inability* on *his* part to set up his domicil in a new jurisdiction is an unsound explanation.

Yet the recent English cases in this regard seem to reach a result somewhat short of social justice in view of the fact that the substantive right is conceded but the adjective assertion of it is rendered largely inoperative. They do so by preserving intact the rule of law, the conclusive presumption, the fiction that the domicil of the wife follows that of the husband and by refusing to recognize it as a fiction. Yet she is resident elsewhere with the intention to remain. Factually she is domiciled there. The only opportunity she has successfully to assert a jurisdiction at her residence is by proving a "desire" on the part of her husband to remain absent in order to avoid that jurisdiction, an almost impossible task as a practical matter. It is submitted that the question could be treated without doing violence either to principle or fact by saying that the presumption that the domicil of the wife follows that of her husband becomes inoperative where the husband deserts and that it remains operative when she deserts, in other words, by allowing the act of desertion to affect the *presumption* as to the *wife*, not the *ability* of the *husband*. This explanation has the advantage of allowing the rule to operate upon the fiction as to the wife, and not upon the factual or legal ability of the husband, with the result that no violence is done to fact or principle. On the contrary, such a theory is directly in accord with the maxim "in fictione juris semper aequitas existat" and with Blackstone's statement that "no fiction shall extend to work an injury, its proper operation being to prevent a mischief or remedy an inconvenience which might result from a general rule of law." This would justify a decision for divorce by a court at the domicil of the wife, which was also the last matrimonial domicil. It would not justify jurisdiction in a third state into which she had moved, but the cases do not go that far on the *in rem* theory. In fact, when viewed in this light, there would seem to be no reason in principle why the act of desertion might not be considered to work a personal estoppel against the husband as a penalty for his act. The fallacy of the *H. v. H.* case in so far as it deals with the estoppel theory is that it assumes that it is an estoppel *in limine* whereas in fact it is an estoppel worked against a husband only after his desertion has been *proved* either in that trial or in a previous separation suit between the same parties.

And this leads to one further question still upon the same point: can desertion by a husband or a wife ever be a justified desertion? Speaking precisely, it seems clear that it cannot be. Desertion is usually defined as a voluntary separation without justification. Departure might be a justified departure, but desertion, strictly speaking, has the meaning of unjustified absence. This is not a mere quibble over words. On the contrary it seems clear that looseness of language in this regard definitely adds further confusion to a matter already confused.

However, what looks like desertion may actually be something else. It may be ejectment through cruelty and therefore not even a voluntary departure. It may be a voluntary departure for good cause. For instance a husband commits adultery, his wife receives knowledge of it, and immediately a cause of action arises in favor of his wife. Continued cohabitation would be condonation and would result in the loss of the cause of action. The departure of the wife is considered justified to preserve her property right in her cause of action. It might also be justified on the ground of cruelty. In these circumstances, if the justification were in favor of the husband the domicil of the wife would follow him. If the justification were in favor of the wife the presumption that her domicil follows his would not apply, and she would be permitted to prove her separate domicil.

The element of desertion is playing a peculiar trick here just as domicil played a peculiar trick earlier in this analysis. It will be remembered how in *Haddock v. Haddock* and *Atherton v. Atherton* it stood as a doorman at the jurisdictional threshold of the case, and how in the cases of *Andrews v. Andrews* and *Cheever v. Wilson* it had changed its uniform and then appeared in the role of detective in the interest of citizenship, intent upon discovering fraud.

Desertion causes somewhat the same sort of con-

fusion here. The ground of desertion is a peculiar one for the reason that it is not only a ground for divorce or separation or both, but it is also, through its effect upon residence, an element in the determination of domicil. In other words, it may have both a substantive and adjective effect simultaneously. For desertion requires change of residence and when that change crosses a jurisdictional boundary and is coupled with an operation of mind, it becomes a change of domicil. With domicil as exclusive evidence of the situs of the *res* and the *in rem* theory adopted for a particular case, the desertion across a jurisdictional boundary therefore does something to the jurisdiction at the same time that it affects the substantive rights of the parties.

It seems sound on grounds of public policy and on principle that the domicil of the wife should not be presumed to follow that of the husband where he departs without justification or where she departs with justification. and that in these circumstances she should be able to retain the domicil at which they had last lived together as husband and wife and sue there for divorce on the *in rem* theory. This rule is open to the obvious objection that it may require a court in some cases to go into the merits of the case in order to determine the matter of jurisdiction. However, this difficulty will only arise in a case which proceeds upon the *in rem* theory with desertion as a ground and where in that desertion the defendant has crossed a jurisdictional line. It seems to be an objection which is impossible of obviation as long as the act of departure across a state boundary not only creates the cause of action but is also an element in the determination of domicil which in turn is considered as exclusive evidence of the *situs* of the *res*.

The situation in this regard may be ground for the contention that the several states should declare that a divorce suit is henceforth to be regarded as a proceeding *in personam*, with personal service upon or appearance by the defendant required, and with domicil of the plaintiff at the forum established as evidence of the absence of fraud against another state. Such a decree would clearly support a judgment of obligatory extra-territorial recognition in the Supreme Court. But, if the foregoing analysis is sound it is not a ground for the contention that the Supreme Court of the United States should so declare.

SOME RECENT DEVELOPMENTS IN PATENT LAW

With Recognition of Propriety of Something That Might Be Called Monopoly in Popular Parlance, Where There Is Sufficient Justification, There Is Naturally a Closer Scrutiny to Determine the Existence of Such Justification and a Severer Condemnation Where It Is Absent—Manifestation of This Attitude by the Courts in Recent Cases in the Field of Patent Law—Supreme Court's Insistence on Strict Standard of Action by Patentee, etc.*

BY JOHN DICKINSON
Assistant Secretary of Commerce

OF ALL the branches of the legal profession, perhaps none is so specialized, or at least regarded by the rest of the profession as so specialized, as is the practice of patent law. The ordinary business lawyer, like myself, views with respectful awe the strange and erudite incidents of your specialty, lying as they do in scientific and technical fields, remote from our training and experience. Indeed, for a non-patent lawyer to venture to address a gathering of specialists like yourselves would involve a certain element of presumption, if it were not for the fact that after all there are aspects of the law and of current industrial and economic problems extending beyond the technical scope of your immediate specialty but which have a bearing upon your work as patent lawyers.

The practice of patent law illustrates, better than any other specialty that I can think of, how a specialty ramifies out and may often require for its successful prosecution contacts with a very much wider range of materials and experience than does a less specialized type of practice. The patent lawyer may be a technical specialist, but he stands at the meeting point of three very broad domains, the domains of law and science and economics. In all three of these fields he must have more than an elementary knowledge if he is to be an effective specialist in his own line of work. No mere mechanical expert, or skilled searcher of records and forms, can hope today to discharge the duties of a patent attorney to his clients. The number of outstanding patents is so vast, and our patent decisions by the courts have become so voluminous, that if our patent law is not to be hopelessly confused and arbitrary, there must be an increasing emphasis on principles rather than on mere precedents, and the adequate development of principles calls, of course, for proper grasp of the fundamentals of law and science.

For example, no one can make even a cursory inspection of the field of patent litigation without discovering immediately that it raises issues and involves methods of reasoning and proof and decision which lie only within the province of the trained lawyer. This is true of every stage of patent procedure. A patent, if it is worth anything, must be able to stand under attack and that means that from the beginning it must be shaped to meet the ultimate test of litiga-

*Address delivered at the annual dinner of the New York Patent Law Association, in New York, March 1, 1934.

tion and so must be shaped from the beginning by lawyers. But not merely must the patent attorney be thoroughly at home in the broad field of legal reasoning and legal principles, he must also be at home among the materials to which legal principles are to be applied in the practice of patent law. He must, in other words, be familiar with the present state of the basic sciences, so that he can apply scientific reasoning to the technical arts and understand the significance of advances in technology. More and more our law is being brought into connection with the facts and realities to which it is applied and more and more we are coming to see that the elaboration and application of legal principles must give effect to the discovery of factual principles in such fields as medicine, economics and the natural and engineering sciences.

To elaborate on the need of the patent lawyer, for knowledge, not merely of technical facts, but also of scientific principles is, I am sure, superfluous in such a gathering as this, and I wish, therefore, to speak of another and different phase of the significance of the patent lawyer's work. Every patent is the grant of an authorized legal monopoly for the term of the patent. The monopoly is justified by the incentive which it holds out for the stimulation of invention and is granted for that express purpose, but it is a monopoly none the less and to that extent comes within the operation of the general body of economic considerations and principles governing the exercise of monopoly. In considering questions of the validity and interpretation of patents, there inevitably arise situations of doubt and uncertainty in the law, where the economic fact of the monopoly character of a patent right no doubt becomes a factor influencing decision in one direction or the other.

The direction and character of our recent economic development has produced increasing interest in the broad question of monopoly, and increased study of the question has inevitably affected the informed and enlightened, as distinguished from the traditional popular view, of the subject. We have come to see, for example, that a great many things upon which the popular stigma of monopoly might conceivably be laid are not necessarily monopolies in any proper economic sense of the term, or that, even if called "monopolies" popularly, they may under proper restraint and supervision be, on balance, preferable to unrestrained competitive rivalry. The substance of the best recent thought is, in short, that monopoly may be permissible where socially and economically justified and under proper regulation and this is, of course, precisely the view which underlies our patent system. The question of any restriction on competition is always properly one of justification; and just as that question has to be worked out in connection with the restriction of competitive practices in the codes of fair competition under the NRA, so the same question in a different setting underlies every determination of the validity of a patent right and of the extension or restriction of the scope of such a right.

With the recognition of the propriety of something that might be called monopoly in popular parlance in cases where sufficient justification exists, there is naturally and properly a closer scrutiny to determine the existence of such justification and a severer condemnation where justification is absent. This tendency which characterizes enlightened public opinion generally is reflected in the attitude of the courts, and it is to the manifestations of this attitude in recent cases in the field of patent law that I wish to call your attention especially this evening.

During the thirty years preceding 1931, the average number of patent cases decided by the Supreme Court each year was two. In the year commencing in December, 1930 and ending in November, 1931, the Supreme Court handed down a series of eleven decisions involving the validity and infringement of patents. Not unless we go back to the period preceding the establishment of the Circuit Court of Appeals to the days when an appeal to the Supreme Court was permitted in every patent case, do we find so large a number of patent cases decided in a single year. In all the eleven cases decided between December, 1930 and November, 1931, the decision was adverse to the patentee. Of the eleven patents involved, nine were held void or invalid and two not infringed. It is also interesting that if we look back over the decisions of the court from the present time, we find that we have to go back for a period of five years to the October Term of 1929 in order to find a case in which the patentee has been successful. Clearly, there is a pronounced tendency toward strictness in adjudicating patents—a tendency to scrutinize the monopolistic grant and to prevent its undue enlargement. This will appear from a brief glance at some of the cases falling within the 1930-1 series of decisions.

In the first case to which I shall refer, the so-called Brogdex case (283 U. S. 1), the Court registered its insistence that the subject matter of a patent shall fall within the statutory definition of patentable subject matter. In that case the question was as to the validity of a patent for preparing oranges for shipment by impregnating the rind with borax to protect it against blue mold decay. The patent was held invalid because the process was anticipated and the product was not a manufacture in such sense as to fall within the field of patentable subject matter. The addition of the borax, the court said, failed to produce from raw material an article possessing a new or distinctive form, quality or property within the meaning of manufacture as defined by the Century Dictionary. "The added substance only protects the natural article against deterioration . . . it remains a fresh orange fit only for the same uses as theretofore." The scope of this decision has been glossed by the Circuit Court of Appeals for this Circuit in an opinion by Judge Swan (Steinfur Patents Co. v. Beyer, Dec. 19, 1932, 62 F. 2d, 238, 240). There the question was as to the validity of a patent for impregnating unbleached fur skins with ferrous sulphate, so as to enable the skins to be bleached by a particular process. The court held the product patent valid and distinguished the Brogdex case on the ground that there the impregnation of the orange rind served only to preserve the original article, while here, the impregnation of the skins fitted them for a bleaching method which could not otherwise be employed and thus by creating a new beneficial use, created what was in substance a new article.

In substance, therefore, the decision of the Brogdex case would seem to be that where the only difference between the article before and after the application of the process is its increased ability to resist decay or deterioration, there is no new patentable subject matter brought into existence. This is the sense in which the decision was understood in *In re Schibsted* before the Court of Customs and Patent Appeals (49 Fed. 2nd, 823). That case involved a

rejection by the Patent Office of certain article-claims for a milk powder so packed in a container as to exclude more of the adhered oxygen than it was possible to exclude by prior methods of packing. The court held that the article claims were properly denied because the only difference between the appellants' article and articles long known to the art consisted in the degree of absence of oxygen, and hence in the greater length of time that would elapse before the article would become rancid and inedible.

Returning to the series of Supreme Court decisions during the 1930 Term, the greater number of these, seven out of the eleven, held the patents void for want of invention over the prior art. In these cases the court has evidenced an intention to insist on some substantial addition to known processes and on something more than the mere application of mechanics to carry out those processes. This is perhaps best illustrated by the so-called Second Dry Ice Case (Carbice Co. v. American Patents Development Co. 283 U. S. 420). There the alleged invention consisted in wrapping a cake of solid carbon dioxide in paper and completely surrounding it with the material to be refrigerated, namely, ice cream. The court held that the refrigerant action of carbon dioxide and the fact that this action would be prolonged if the solid carbon dioxide was wrapped in paper had long been known, while the structural device of surrounding the refrigerant by the article to be refrigerated had been previously shown in other patents. The fact that in these prior art structures the refrigerant was only partially surrounded by the refrigerated materials, and not completely surrounded, as in the invention under consideration, was held to be immaterial, since due only to the different nature of the refrigerating materials in the two cases—ice in the one, carbon dioxide in the other.

Another case in which the Supreme Court held a patent invalid as involving only the application of mechanics to the prior art was the so-called *Saranac* case (282 U. S. 704) in which a claim for a box-making machine was held invalid over a prior patent to the same inventor for a box "blank." The court held that the machine patent involved only the application of mechanical skill to devise suitable mechanical means for the manufacture of the article disclosed by the earlier patent. In the closing paragraph of the opinion of the court, Mr. Justice Stone declared that the question presented was the attempted extension of a monopoly which had expired by resorting to a patent which did not involve invention.

A further field in which the Supreme Court has insisted on a strict standard of action by the patentee has been in connection with the subject of disclaimers. Since 1837, when the first disclaimer statute was enacted, there has been an obligation upon the patentee who has an invalid claim in his patent to remove it by a disclaimer within a reasonable time after he becomes aware of the invalidity at the risk of otherwise invalidating his entire patent. In the *Ensten* case, decided February 2, 1931 (282 U. S. 445), the Supreme Court held that where a district court had found one of the claims of a patent invalid in an interlocutory decree, and the patentee did not appeal, it was his duty to disclaim at once, and that not having done so he was guilty of the unreasonable delay which, under the statute, invalidated his entire patent. The court said that otherwise by the assertion of an apparent monopoly, the patentee might defer others from legitimate action, and thus seriously prejudice the public. The *Ensten* case has resulted in a series of decisions in the lower courts which have progressively increased the strictness of the obligation to disclaim. Thus the *Radio Condenser* case (65 F. 2d, 458) held that when a patentee loses a Patent Office interference case, he is obliged to disclaim the lost claims if he does not appeal. And a recent case, decided in the Ninth Circuit only a few weeks ago, held that where the patentee waited fourteen months after a Master had filed a report holding a claim invalid, before disclaiming, and no exception having been taken to the Master's holding, the entire patent became invalid. It is interesting that in the three years since the *Ensten* case, three patents have been held invalid for unreasonable delay under the disclaimer statute, as against only two such holdings during the entire ninety-five years between the passage of the statute and the *Ensten* decision.

Not merely have the courts thus increased their strictness as to the time when a disclaimer must be filed, but also as to the kind of disclaimers permissible. Where a disclaimer takes the form not of a cancellation of the whole claim from the patent, but of an amendment, adding a limitation to the claim, a number of recent decisions indicate on the part of the court an intention to scrutinize very strictly disclaimers of this type and to strike down disclaimers satisfying the more uncritical requirements of the earlier decisions (*Freuhauf Trailer Co. v. Highway Trailer Co.* 54 F. 2d. 691, 67 F. 2d. 558; *Grasselli Chemical Co. v. National Aniline Co.* 26 F. 2d. 305).

The issues of public policy involved in the law on the subject of disclaimers are analogous to those raised by the question of intervening rights arising before a reissued patent. Here the Supreme Court has not spoken with finality, but there have been interesting decisions in the lower courts, tending again in the direction of narrowing the position of the patentee. Thus in the *Ashland Brick* case (27 F. 2d, 744) the plaintiff had obtained a patent for a certain type of brick-making machinery. After it had been granted, the defendant built and operated two machines which did not infringe. Subsequently the plaintiff obtained a reissue with broadened claims which the defendant's machine did infringe. The Court of Appeals reversed the District Court and ruled that the defendant could not be held liable as an infringer. This would seem to be the first square ruling that an intervener does not infringe the reissued patent. There are important questions left outstanding, as for example: does the intervener merely acquire a personal license under the reissued patent, or is the general validity of the reissue in any way brought into question? What is the critical date before which the intervening act must be committed, the date when the reissued patent was applied for, or the date when it was granted? If the intervening act gives rise only to an imputed personal license in the intervener, is he free to enlarge his business, or is he confined to the scope of it developed before the reissue?

The question of monopoly involved in all patent law is emphasized in the field where patent law comes in contact with so-called anti-trust law—that is to say, where contracts or agreements by patentees in connection with the sale of patented articles, or with licenses to use their patents, have been challenged as in restraint of trade. In the field of resale price maintenance, where the courts have taken the general position that an attempt of the seller to control by contract the

price at which the buyer may resell the article is invalid as in restraint of trade, they have applied the same rule to patented as to unpatented articles and have held that the existence of a patent confers no right to control the price of the article after it has passed out of the hands of the owner of the patent or his licensee (*Bauer* v. *O'Donnell*, 229 U. S. 1). Here, as elsewhere, however, the right does exist to control prices where the sales are made through an agent and the question, therefore, always arises as to whether there is a true agency or a purchase disguised as an agency to evade the law (*U. S.* v. *General Electric Co.* 272 U. S. 476). When we turn from the validity of resale price maintenance agreements to so-called "tying clauses," where the vendor of an article attempts to restrict its use in the hands of the purchasers by requiring that it shall be used only in connection with another article or articles bought from the vendor or his designee, the earlier decisions held such contract provisions valid, where the sale was of a patented article (*Dick Mimeograph* case, 224 U. S. 1). This rule was, however, expressly changed by statute in Section 3 of the Clayton Act, which makes tying clauses invalid in connection with the sale of patented or unpatented goods. The principle underlying the statute is that the monopoly granted by the patent shall not be broadened to include articles not covered by the grant.

From the standpoint of the larger economic issues with which the economic statesmanship of the country is now wrestling as a result of the depression, the most important class of patent cases arising under the anti-trust laws are those which deal with so-called patent pools. The patent pool is a device to eliminate waste and provide for the wider use of patented inventions through cross-licensing agreements, whereby non-exclusive reciprocal licenses are granted to each of the members interchanging patent rights, thus making possible the use of a number of patents in combination and eliminating the necessity of mutual adjustment through the costly medium of infringement litigation. When limited to these economically sound and socially beneficial purposes, the patent pool has been held legal by the Supreme Court in the well-known *Gasoline Cracking* case (*Standard Oil Co.* v. *U. S.* 283 U. S. 163). In that case the primary defendants owned competing patented processes for manufacturing oil. Interferences developed in the Patent Office and widespread litigation threatened in the industry. In an effort to settle amicably their differences, the companies entered into an agreement whereby each, in licensing under its own patents, acquired the right to extend to its licensee immunity from claims of infringement of patents controlled by the others. A schedule of royalties was provided and an agreement was made for the apportionment of these among the four primary defendants. The government contended that the agreement was bad in itself because giving to the defendants the power to maintain existing royalties. The position of the government was sustained by the lower court, which held the agreement in restraint of trade, but was reversed on appeal to the Supreme Court on the ground that the decisive question was whether or not the agreement had actually been used to fix prices, or impose an unreasonable restraint upon competition and that in fact the evidence disclosed that it had not been so employed.

The *Gasoline Cracking* Case discloses the principles which define the legitimate use of patent pools and cross-licensing agreements. The present line between the legitimate and illegitimate is marked out by comparing that decision with the consent decree entered a year or so ago in the *Radio* case. There the original agreement had deprived each of the participating companies of the right to license its patents for use in the fields alloted to the other companies. Under the agreements entered into as a result of and in conformity with the consent decree, each company has the right to operate under its own patents and likewise the full right to grant licenses under those patents in specified fields. A greater measure of competition is thus restored and the arrangement brought more closely into conformity with the scheme approved in the *Gasoline Cracking* case.

The country is at present undergoing a far-reaching evolutionary process in its attitude toward competion and the organization of industry. Through the National Recovery Administration, the Government is engaged in sanctioning, after proper inspection and supervision, co-operative efforts by every line of industry to deal by appropriate regulations with some of the problems of friction and maladjustment and waste from which they have long been suffering. This attempt at the self-regulation of industry by the co-operative action of its members offers a happy compromise between competitive anarchy, mixed with selfish monopoly on the one hand, and on the other, a degree of governmental supervision and interference in industrial matters which would break down of its own weight because of the tremendous administrative machinery that would be required. As we come to recognize under the impact of modern conditions that inevitably more and more regulation of industrial activity will be required if our industrial structure is not to break down, we must also recognize that the great bulk of that regulation is simply beyond the power of government itself to administer directly and that the only solution is a wide measure of self-regulation under proper government control.

The matter of the self-regulation of industry is of interest to patent lawyers primarily in connection with the provisions of codes which undertake to prohibit as an unfair competitive practice design piracy, the limitation of trade-marks or trade names and the like. It can hardly be doubtful that with provisions of this kind inserted in the codes and with a machinery established in each industry to deal with cases arising under them, there will be much greater likelihood of the protection of the rights involved than is possible through occasional litigation in the courts. There is a great field of opportunity open to lawyers who specialize in these matters through participating in the setting up of adequate machinery under the codes and through guiding the administration of that machinery toward sound and lawyer-like decisions. This task of building up a new law merchant of trade practice through machinery for the first time adequate to the task opens up a fascinating opportunity for constructive service. Of course during the formative period, difficulties of many kinds will arise. No doubt divergent results may be reached in different industries for which sooner or later some method of providing a uniform solution through appeal to the courts or otherwise will have to be devised. Meanwhile, no one is deprived of his right to resort to the forum of the ordinary courts if he desires to use it.

The provision under the codes of new machinery for the protection of rights of industrial property, like designs and trademarks, is bound, I believe, to empha-

size those rights and their value and importance. That has always been the history of such developments in the past. The formal legal rights which we enjoy today, and the formal legal institutions to which we resort for protection, had their origin and first beginnings in informal institutions of adjustment and arbitration. In the transition from the informal and extra-legal to the formal and the legal lie the task and the opportunity of the constructive lawyer. In the field of practice before, and in connection with, the industrial tribunals which are set up under the codes lies the great opportunity for the moment of the commercial lawyer and no less of the lawyer who is interested in the development of the law of intangible personal property rights. For that task he needs more than ever a broad acquaintance with the economic problems of our times, and upon his ability to grasp those problems will depend in large measure the success or failure of our great attempt to maintain our modern industrial system based on invention, and the standard of living which, if maintained, it is capable of providing for our people.

Review of Recent Supreme Court Decisions

(*Continued from page* 558)

Evidence—Competency of Wife to Testify in Behalf of Husband in Criminal Case

In a criminal case in the federal courts the defendant's wife is competent to testify in his behalf.

Funk v. United States, Adv. Op. 231; Sup. Ct. Rep. Vol. 54, p. 212.

The opinion in this case, delivered by MR. JUSTICE SUTHERLAND, dealt with the competency of the wife of a defendant, on trial in a criminal case in a federal court, to testify in his behalf. The wife's competency to testify *against* her husband in such a case was not involved. Two trials were had, and in both the trial court excluded the wife's testimony on the ground of her incompetency to testify in behalf of her husband. The Circuit Court of Appeals sustained the ruling; but on certiorari it was reversed by the Supreme Court, two of the Justices dissenting.

Both the petitioner and the Government relied upon prior decisions of the Court, which were reviewed in the opinion. The conclusions reached from a review of certain of these cases were: (1) that under the earlier cases the view was taken that the question was controlled by the common law as it existed in the thirteen original States in 1789 or as it existed at the time of admission of the particular state where the trial was had unless Congress had otherwise provided; (2) that under later cases the view was adopted that the federal courts were competent to declare and make operative modifications in the rules of the old common law resulting from changed conditions.

With these conclusions in mind, MR. JUSTICE SUTHERLAND discussed the reasons which indicate that the disqualification of a wife to testify in behalf of her husband should no longer be enforced. With reference to this he said:

> The rules of the common law which disqualified as witnesses persons having an interest long since in the main have been abolished both in England and in this country; and what was once regarded as a sufficient ground for excluding the testimony of such persons altogether has come to be uniformly and more sensibly regarded as affecting the credit of the witness only. Whatever was the danger that an interested witness would not speak the truth—and the danger never was as great as claimed—its effect has been minimized almost to the vanishing point by the test of cross-examination, the increased intelligence of jurors, and perhaps other circumstances. The modern rule which has removed the disqualification from persons accused of crime gradually came into force after the middle of the last century, and is today universally accepted. The exclusion of the husband or wife is said by this court to be based upon his or her interest in the event. . . And whether by this is meant a practical interest in the result of the prosecution or merely a sentimental interest because of the marital relationship, makes little difference. In either case, a refusal to permit the wife upon the ground of interest to testify in behalf of her husband, while permitting him, who has the greater interest, to testify for himself, presents a manifest incongruity.
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> Nor can the exclusion of the wife's testimony, in the face of the broad and liberal extension of the rules in respect of the competency of witnesses generally, be any longer justified, if it ever was justified, on any ground of public policy. It has been said that to admit such testimony is against public policy because it would endanger the harmony and confidence of marital relations, and, moreover, would subject the witness to the temptation to commit perjury. Modern legislation, in making either spouse competent to testify in behalf of the other in criminal cases, has definitely rejected these notions, and in the light of such legislation and of modern thought they seem to be altogether fanciful. The public policy of one generation may not, under changed conditions, be the public policy of another. . .
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> The fundamental basis upon which all rules of evidence must rest—if they are to rest upon reason—is their adaptation to the successful development of the truth. And since experience is of all teachers the most dependable, and since experience also is a continuous process, it follows that a rule of evidence at the time thought necessary to the ascertainment of truth should yield to the experience of a succeeding generation whenever that experience has clearly demonstrated the fallacy or unwisdom of the old rule.
>
> It may be said that the court should continue to enforce the old rule, however contrary to modern experience and thought, and however opposed, in principle, to the general current of legislation and of judicial opinion, it may have become, leaving to Congress the responsibility of changing it. Of course, Congress has that power; but if Congress fail to act, as it has failed in respect to the matter now under review, and the court be called upon to decide the question, is it not the duty of the court, if it possesses the power, to decide it in accordance with present day standards of wisdom and justice rather than in accordance with some outworn and antiquated rule of the past? That this court has the power to do so is necessarily implicit in the opinions delivered in deciding the *Benson* and *Rosen* cases. And that implication, we think, rests upon substantial ground. The rule of the common law which denies the competency of one spouse to testify in behalf of the other in a criminal prosecution has not been modified by congressional legislation; nor has Congress directed the federal courts to follow state law upon that subject, as it has in respect of some other subjects. That this court and the other federal courts, in this situation and by right of their own powers, may decline to enforce the ancient rule of the common law under conditions as they now exist we think is not fairly open to doubt.

After quoting language from the opinion in *Hurtado v. California*, 110 U. S., 516, 530, commenting on the capacity for growth and adaptation which is the

boast of the common law, MR. JUSTICE SUTHERLAND added:

> To concede this capacity for growth and change in the common law by drawing "its inspiration from every fountain of justice," and at the same time to say that the courts of this country are forever bound to perpetuate such of its rules as, by every reasonable test, are found to be neither wise nor just, because we have once adopted them as suited to our situation and institutions at a particular time, is to deny to the common law in the place of its adoption a "flexibility and capacity for growth and adaptation" which was "the peculiar boast and excellence" of the system in the place of its origin.
>
> The final question to which we are thus brought is not that of the power of the federal courts to amend or repeal any given rule or principle of the common law, for they neither have nor claim that power, but it is the question of the power of these courts, in the complete absence of congressional legislation on the subject, to declare and effectuate, upon common law principles, what is the present rule upon a given subject in the light of fundamentally altered conditions, without regard to what has previously been declared and practiced. It has been said so often as to have become axiomatic that the common law is not immutable but flexible, and by its own principles adapts itself to varying conditions.

In conclusion the Court added that the view taken by the lower courts was sustained by *Hendrix v. United States,* 219 U. S. 79, and *Jin Fuey Moy v. United States,* 254 U. S. 189, but that they are overruled as to question under discussion.

MR. JUSTICE CARDOZO concurred in the result. MR. JUSTICE MCREYNOLDS and MR. JUSTICE BUTLER dissented.

The case was argued by Mr. John W. Carter Jr. for the petitioner and by Assistant Solicitor General MacLean for the respondent.

COLORFUL PAGEANT SHOWS WISCONSIN'S THREE HUNDRED YEARS OF HISTORY

Visit to Tercentenary Celebration at Green Bay One of the Striking Entertainment Features Arranged for Members of the American Bar Association Attending the Annual Meeting at Milwaukee—Successive Episodes in Pageant Present State's Rich Historical Background under Three Flags

BY PERRY C. HILL, JR.
Staff Writer for Milwaukee Sentinel

AS this issue of the JOURNAL goes to press members of the Association already are making plans and preparations for attending the convention at Milwaukee Aug. 28-31 and for partaking incidentally of Wisconsin's famed hospitality.

Wisconsin is a proud state. She is proud of her natural beauties, proud of her efficient municipalities, of her courts of law and administration of justice. She is proud of the "Wisconsin Idea" which gives her the lead among states in liberal legislation.

Particularly does she glory in her three hundred years of glamorous history under the French, British, and American flags. A spectacular pageant, "Under Three Flags," is a feature of the summer-long Tercentenary celebration at Green Bay, 120 miles north of Milwaukee, where Wisconsin history began.

After the full-course dinner of legalistic discussion, learned speechmaking, and organizational business at the convention, "dessert" will be an automobile trip to Green Bay, arranged by the convention management, to witness the pageant and otherwise delve into the exciting history of the American Northwest, on Saturday, Sept. 1.

The "Creole City" of Green Bay straddles the mouth of the Fox river, which feeds the crystal waters of Green Bay itself, an arm of Lake Michigan which dips southward, slicing off that portion of Wisconsin known as the Door county peninsula. Door county, incidentally, accounts for most of the nation's cherries, and the juiciest.

In August, 1634, a young Frenchman, sent westward from Quebec to see what he might find to the glory of France and the Catholic church, set foot in Wisconsin, at Green Bay, the first white man to enter the state. It is that famous event which the Tercentenary celebration commemorates.

It was to partake in the celebration that President Roosevelt stopped at Green Bay on Aug. 9, en route across the continent back to Washington. Because of the intricate and delicate political situation, his tribute to Wisconsin's history was partially overshadowed because the citizenry listened so anxiously for a political dictum.

After the hectic, crowded days of the convention in Milwaukee the nation's assembled barristers will have more leisure than did the president to relax and to enjoy the beauties of Green Bay and its colorful pageant.

Successive episodes in the pageant show Nicolet receiving instructions for his mission at Quebec, then his epochal arrival on Wisconsin shores. Already equipped with the idea he might find a westward passage to Cathay, the young adventurer was convinced he had found it when he espied the Winnebago Indians.

"When in China do as the Chinese do," said Nicolet to himself. He therefore donned the robes of a Chinese mandarin, and, although the custom

was not yet established in China, he approached the wondering Indians, supposed Orientals, firing his pistols into the air to enhance the majesty of the occasion.

In spite of the unpropitious opening Nicolet managed to procure some Winnebago signatures to a ready-made treaty and proceeded to unfurl the French fleur-de-lis. Other episodes unfold the military and religious infiltration of Wisconsin by the French, until the Peace of Paris in 1763 raised the British flag over all the American dominions of France.

The British occupation brought traders in swarms, who profited greatly in the fur trade. After 1812 the little Green Bay settlement, still French at heart, was left without protection by the British withdrawal. An American fort was established, under the command of Col. Zachary Taylor, who unfurled the Stars and Stripes.

The scene shifts to Milwaukee, still the primitive home of the Potawatomi Indians. Proudly, however, they fly the American flag. Along comes a gay, young Canadian named Solomon Juneau, who marries the daughter of a French trader and settles down near the mouth of the Milwaukee river.

Today convention delegates will find the name of Juneau, the Founder, at every turn. A heroic statue stands on the bluff above the lake. With his back to the blue waters Solomon Juneau gazes grimly, majestically over the great city which grew from his little cottage.

Juneau became the first mayor of Milwaukee, his village being confined to the east shore of the Milwaukee river, which flows parallel to the lake shore, cleaving the heart of the modern city. Another thriving community grew up on the west side of the river, headed by Byron Kilbourn, who ranks second to Juneau as a Founder.

Though the two mayors were close personal friends, a bitter rivalry flourished between the two communities. To such lengths was the feeling carried that streets were deliberately laid out on opposite sides of the river so that they did not coincide. The visitor today will observe that many of the bridges are askew, that other streets have no correspondents across the river.

The pageant shifts to southwestern Wisconsin, where mining flourished in the early days. Because of the intense cold the miners in winter forsake their tents and dig holes in the rocks, where they were said to live like badgers. Hence Wisconsin, though containing few badgers, is the Badger State.

In 1835 the region became Wisconsin Territory. Oddly, during the formative stage of the territory, most of Wisconsin for a few months was technically part of Wayne county, Michigan, which contains Detroit. After 13 years as a territory, Wisconsin acquired sufficient population to take her place as the thirtieth state.

The State of Wisconsin, as the pageant portrays, became a lodestone for the peoples of the world. Particularly came the Norwegians to settle the rich pasture lands which make Wisconsin the leading dairy state. In Milwaukee, as is well-known, were concentrated the Germans, solid, substantial people, with integrity and vision.

The German love of living—love of homes, love of music, love of good beer—is so pronounced a characteristic of the city that it will immediately impress the convention visitor. The pleasant homes of Milwaukeeans fill the entire county, and the "City" is famed for the delightful, wholesome atmosphere of its beer gardens and restaurants.

Green Bay's Tercentenary pageant will delightfully introduce the convention delegates who make the trip to the rich historical background of present-day Milwaukee and the state of which it is the hub and heart.

Modernize Your Advertising

By VERE RADIR NORTON, of the Los Angeles Bar

(From Los Angeles Bar Bulletin)

HAVING been approached by one purporting to represent one of our newspapers with the statement that "we want to interest you in our plan for advertising for lawyers," I have been impelled to draft a sample advertisement to indicate the possibilities. Here it is:

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NEWS OF STATE AND LOCAL BAR ASSOCIATIONS

Alabama

FRANCIS J. INGE
President, Alabama State Bar Association

Alabama State Bar Association Moves to Take More Active Part in Procuring Constructive Legislation in Legal Field—President Appeals for Maintenance of Constitutional Principles

The Alabama State Bar Association held its annual meeting in Mobile, July 6 and 7, 1934.

Since the adoption in Alabama in 1923 of the new State Bar law, and the merger immediately thereafter of the old Alabama State Bar Association into the all-inclusive bar, which is an arm of the State, it has been difficult to maintain the former interest in the broad work of the Association, apart from the special work of the Board who constitute the Commissioners of the State Bar. The Board works with eminent success, both in the matter of regulating the admission of applicants to practice law, and in the matter of bringing proceedings for suspension or disbarment. But it is natural for many members to feel that successful functioning in those important lines of work is enough. Hence the laxity of interest which has been observed in other lines of work by the Bar Association in Alabama.

However, at Mobile, the Association determined to take more active part in procuring constructive legislation in the field of law. A committee was appointed to revise the state system of probate administration, and another committee was appointed to procure an enabling act from the legislature to allow the State Supreme Court, assisted by the Bar Association, to set up a new system of equity procedure in all the courts of the State, and to retain authority over the new system as a system of rules.

If these two plans are successfully put through the Legislature of 1935, the Bar Association will have ground to be proud of its accomplishments.

The annual address at the Mobile Meeting was delivered by United States Senator Hugo L. Black on the "Tendency of Modern Federal Legislation," and was an excellent elucidation and discussion of the objectives sought to be accomplished.

The address of the President of the Association, A. Leo Oberdorfer, was a strong appeal for continuation of constitutional government, and the perpetuation of our heretofore recognized constitutional principles.

The Association adopted a resolution favoring adherence by the United States to the World Court.

Committee reports were made on "Criminal Law and Its Enforcement," "Legal Education," "Unauthorized Practice of Law," and "The Selection of Judges."

Francis J. Inge, of the Mobile Bar, was elected President for the ensuing year, and W. B. Harrison was reelected Secretary by the Commissioners.

The visiting members of the Bar were delightfully entertained by the Mobile Bar Association and its members.

W. B. HARRISON, Secretary.

Iowa

Large Attendance and Enthusiasm Mark Annual Meeting of Iowa State Bar Association—Iowa Law Review Made State Bar Journal—President Evans Speaks

The Iowa State Bar Association held its fortieth annual meeting at Waterloo, Iowa, on June 21st and 22nd. In attendance at the meeting were approximately 550 Iowa lawyers.

The meeting was featured by the introduction of section groups similar to the plan of the annual meeting of the American Bar Association. Two of the sections discussed subjects on the national bar program of the American Bar Association. These subjects were "Unauthorized Practice of the Law" and "Criminal Law and Its Enforcement." Another section dealt with the subject of "Procedure, Pleadings, Evidence, and Remedies," and a fourth section consisted of members of the bar admitted to the practice in the last six years.

Another interesting feature was the debate between Thomas J. Bray and George F. Heindel on the subject, "Resolved: That the Agricultural Adjustment Act and the National Industrial Recovery Act Illegally Encroach Upon the Reserved Powers of the Several States." The concluding part of the program was an address by President Earle W. Evans of the American Bar Association on the subject, "The National Bar Program."

HON. THOMAS J. GUTHRIE
President, Iowa State Bar Association

Among the important actions taken at the Association meeting were: (1) The establishment of the Iowa Law Review as the State Bar Journal. This review has been published for nineteen years by the State University of Iowa and will now go to every member of the Iowa State Bar Association and will contain twenty pages of additional material relating to State Bar Association primarily. (2) A Special Commit-

tee was organized to coordinate the work of the State Bar Association in mutual problems with the work of the American Bar Association. (3) The section meetings will be continued into the program of the coming year.

Much enthusiasm was shown for the work and activity of the Iowa State Bar Association. There was a much larger attendance than usual and an apparent general realization of the need of cooperative efforts on the part of the members of the bar in dealing with our common professional problems. The meeting was one of the more successful ones of recent years and should result in enlarging both the membership and the activities of the State Association.

The meeting next year will be held June 20 and 21 at Cedar Rapids, Iowa.

MASON LADD, Secretary.

Ohio

Ohio Bar Association Recommends Abolition of Office of Justice of the Peace and Other Judicial Changes —Two Addresses Deal with Constitutionality of National Recovery Act—Largest Attendance in Recent Years

Approximately 800 members attended the 55th Annual Meeting of the Ohio State Bar Association at Cedar Point, Ohio, July 12-15. This was the largest attendance in recent years.

President A. R. Johnson of Ironton, in his annual address, paid high tribute to the eminent lawyers who made the Ohio Bar one of the great Bars of the United States. He advocated a militant bar, alert to its responsibilities and duty to the court and public.

The report of the Committee on Judicial Administration and Legal Reform, under the Chairmanship of W. J. Stevenson of Cleveland, and with Henry G. Binns of Columbus as Chairman of a sub-committee, recommended the abolition of the office of justice of peace and increase of the jurisdiction of the Common Pleas Court; creation of a division of conciliation, arbitration and small claims and minor offenses; and the appointment of commissioners to act as conciliators. The proposal also deprived mayors' courts of civil jurisdiction. The meeting approved those proposals, but a recommendation to provide waiver of trial by jury unless demanded and to require a deposit for jury fees was not approved by the meeting.

The meeting reversed former action of the Association in fostering a movement to inform the lawyers and the electors of the qualifications of candidates for judges of the Ohio Supreme Court.

GEORGE W. SPOONER
President, Ohio Bar Association
(Photo by Bachrach.)

The report of Chairman A. G. Fuller of Findlay, for the Probate Law Committee, which was adopted, recommended that Ohio laws be amended to require probate judges to be lawyers or to have previously served in that office immediately prior to election. The Probate Law Committee report also recommended that trust companies be required to give bond when acting as fiduciaries and that wills of residents of foreign jurisdictions be admitted to original probate in Ohio if in conformity with the laws of Ohio.

Frank X. Schaut of Cleveland, Chairman of the State Bar Legislation Committee and of a Special Advisory Committee on Public Utility Laws, and Vice Chairman Howell Wright of Cleveland, submitted a report recommending:

(1) A utilities commission of three, appointed by the Governor and approved by the Senate, for 12 year terms, at $12,000 a year, one member to be a lawyer, another an engineer and a third either a Certified Public Accountant or an experienced business executive. Commissioners are to be prohibited from becoming candidates for public office during incumbency or within two years after terms expire.

(2) Increasing technical and engineering staff with adequate compensation, civil service protection or other merit plan of selection.

(3) Authorizing a research department to gather current and reliable information relative to business management, engineering, etc.

(4) Making the Commission separate and independent branch of state government free from entangling political alliance with other state departments.

(5) Continuing the Attorney General as chief legal adviser of the Commission, serving only as counsel for the commission and not also as counsel to the people.

(6) Increasing assessments against utilities for the support of the commission, assessments to be made against both municipally and privately owned utilities, and funds to be available only to commission. The Special Advisory Committee all concurred, excepting one member, agreeing that publicly owned utilities should be placed under the jurisdiction and control of the commission.

(7) Permitting commissioners to determine salaries of its personnel below commissioners.

(8) Permitting appeal from rate ordinances in the home-rule cities. Publicly owned utilities to be taxed and greater authority given in assessing villages and cities not under home rule in making valuations and appraisals.

(9) Extending commission's jurisdiction over municipally owned utilities to establish uniform classification of accounts, require annual reports, examination and audit of books, records, etc., require certificates of convenience and necessity to establish municipally owned plants and other utilities or for extension of their services.

(10) Regulating inter-city utilities by the state commission rather than municipalities.

It was recommended that the commission be given power to subpoena anyone whose opinions, criticisms or advice would be helpful to the commission and that the commission develop its rules and regulations of practice and procedure.

The Special Advisory Committee recommended that the doctrine of administrative finality be adopted as much as possible without infringing constitutional principles.

The report favored permitting the commission to fix temporary rates pending final decision by the commission and pending appeal.

The Special Committee recommended defining more clearly the powers of the commission over so-called holding companies with offices outside of Ohio by requiring reports which would fully disclose intercompany relations and transactions and the cost of service by the holding companies to their controlled subsidiaries.

The report of the Special Advisory Committee on Public Utility Laws was received and filed, the committee was continued for further research and study, and to draft legislation for con-

sideration at the next meeting of the Association.

The Committee on Legal Education, through Chairman Grauman Marks of Cincinnati, reported that the Ohio Supreme Court had limited examinations from 5 to 4, had eliminated "bailments" as an examination subject and added the subjects of "trusts," "conflict of laws" and "municipal corporations." The Court had also adopted a rule providing for a questionnaire similar to that used in Pennsylvania to cover the investigation and determination of fitness and character of applicants at the time of registration. The Legal Education Committee noted with approval the formation of a League of Ohio Law Schools, the formation of student associations in law schools modeled upon bar associations, and the development of law institutes in the larger cities. The committee viewed with concern the increase in lawyers admitted to practice in Ohio within the last ten years, which is out of proportion to that in other states.

Former President Robert Guinther of Akron, as Chairman of the Committee on Integration of the Bar, outlined the proposed memorial which is to be submitted to the Supreme Court providing for organizing the Bar through judicial order.

Charles P. Taft II of Cincinnati, member of the Ohio Commission on County Government, addressed the meeting, outlining how the commission was created to study county and township governments after the adoption of an Ohio Constitutional Amendment authorizing optional forms or home rule in county government. He advocated for the present centralizing health and welfare agencies into a county unit. The ultimate aim under the new Constitutional Amendment is to accomplish the merging of county offices and the abolition of township and other overlapping governmental agencies.

Hon. A. G. McKnight of Washington, D. C., Director of the Division of Litigation for the NIRA, addressed the Association upon the constitutionality of that act, and Congressman John B. Hollister of Cincinnati discussed the fundamental principles underlying a determination of its constitutionality.

The Prosecuting Attorneys' Section was addressed by Professor Newman F. Baker of Northwestern University upon the subject "The Improvement of the Office of Prosecutor." He strongly urged that that officer be relieved of civil matters, which should be handled through a solicitor, and that the prosecutor be taken from the field of politics and be appointed with a long tenure to permit development of specially trained lawyers in the criminal field.

The Conference of Bar Association Delegates was addressed by W. Donald Hall of Cincinnati, Special Assistant to Attorney General John W. Bricker, upon the subject "Industrial Regulation Under the National and State Recovery Acts." Scott E. Leslie, handwriting expert of New York City, addressed the Conference upon "Identification of Questioned Documents," recounting many experiences with altered and forged papers.

Chairman J. Paul McNamara of Columbus reported the formation within the State Association of a Junior Bar composed of members who had been admitted to practice not more than ten years. The purpose of the Junior Bar is to foster discussion and interchange of ideas relative to the duties, responsibilities and problems of the younger lawyer.

The report of the Executive Committee, delivered by W. P. Ainsworth of Medina, informed the members of the establishment of a law library in the Deshler-Wallick Hotel, Columbus, for the benefit of nonresident members visiting the Capital. Books from the library were donated by the Supreme Court, law publishing houses and association members.

The banquet Saturday night was addressed by Sylvester V. McMahon, President of the Cleveland Bar Association, and on Sunday morning a Memorial Service was held in tribute to members who had died during the year.

George W. Spooner of Cleveland was elected President, J. L. W. Henney of Columbus was re-elected Secretary and Treasurer, Col. G. L. Yearick of Newark was renamed Chairman of the Prosecuting Attorneys' Section, and Walter L. Flory of Cleveland was chosen as Chairman of the Conference of Bar Association Delegates. Gerritt J. Fredriks of Cincinnati, Charles D. Fogle of Marietta, and Oscar A. Stephens of Youngstown were elected to the Executive Committee for three years, and Howard L. Barkdull of Cleveland was elected for one year.

J. L. W. HENNEY, Secretary.

Wyoming

Wyoming State Bar Meeting Well Attended—President Evans of the American Bar Association Delivers Address

The Wyoming State Bar Association met at Medicine Bow Lodge, a very attractive summer resort in the Medicine Bow National Forest, on July 20th and 21st. The meeting was well attended and extremely profitable to those who were fortunate enough to be in attendance, as a program of carefully prepared papers was presented.

At the conclusion of the meeting the following officers were elected: President, J. R. Sullivan, Laramie; First Vice-Pres., J. A. Greenwood, Cheyenne; Second Vice-Pres., C. A. Brimmer, Rawlins; Secretary-Treas., L. C. Sampson, Cheyenne.

JOSEPH R. SULLIVAN
President, Wyoming State Bar Association

The following addresses were delivered: President's Address — "The Gold Clause," by Hon. Thomas A. Hunter; "Instructions to Juries," by Judge T. Blake Kennedy, Judge of the Federal Court, Wyoming; "Trial of the Lincoln Conspirators," Hon. Ralph Kimball, Chief Justice of the State Supreme Court; "The Legal Profession and the Public," by Hon. Earle W. Evans, President of the American Bar Association; "Genesis of the Codes," by Hon. Fred Wright of the Denver Bar.

L. C. SAMPSON, Secretary.

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The Movement for Bar Integration

In the month of September the work of organizing the Kentucky State Bar will be virtually completed. It will be recalled that in March the legislature enacted a brief law which directed the Court of Appeal to effect an inclusive organization of the profession and to provide by rules for the enforcement of ethical standards. The matter of shaping an organization has progressed smoothly. The considerable experience had in other states has doubtless been helpful. Details of organization are not available at the time this is being written. It is understood, however, that the Court has conferred with representatives of the Bar. They concurred in the proposal that the Chief Justice appoint the secretary of the organization.

In this column in the June number of the JOURNAL the statement was made that none of those recommended by the California State Bar for discipline by the Supreme Court "gained more than a slight reduction" in the recommended sentence. "This is slightly in error," writes Mr. Philbrick McCoy, counsel to the State Bar, who adds: "Two proceedings have been dismissed on review, to-wit, Burke v. State Bar, 218 Cal. 143, 21 P. (2d) 577, and Clark v. State Bar, 214 Cal. 281, 4 P. (2d) 944. The Court also dismissed the proceedings in Golden v. State Bar without prejudice for the reason stated in the opinion. See 213 Cal. 237, 2 P. (2d) 325."

A very good record for the Bar, however, in view of the fact that in seventy-six cases the respondents sought relief from the Bar's orders for suspension or disbarment.

The history of the California State Bar, beginning with the time the State Bar Association was walloped by banks and trust companies in a state-wide referendum of the act of 1923 which defined the practice of law, and continuing through until 1935 or later, would make a thrilling volume. Defeat on the referendum referred to was not only accompanied by a memory of abusive and derisive terms applied to the profession, but it appeared to leave the critics of the profession free to practice as corporations. But the means for turning inglorious defeat into constructive lines was at hand in the model bar organization acts. Idaho and Alabama lawyers had made the right start through legislation enacted in 1923. The California State Bar Association and lawyers generally listened to the counsels of Mr. Joseph J. Webb, who devoted 133 days to travel throughout the state. In 1925 the self-governing bar act was passed, and then vetoed. Two years later, with another governor, the act was passed again, and signed. Then began a swift ride, not yet without excitement.

Last fall application was made to the Supreme Court by candidates for admission who had failed to receive the approval of the State Bar's examining board, with a number of sensational charges. The Court permitted certain candidates to take the next examination, and finally closed the matter with full approval of the system of examinations and the work of the examiners. The foundation for constructive work was laid by the State Bar, which caused an investigation to be made of the entire matter of legal education in local schools, and it was found that of the twenty "schools" some were no better than rackets.

A few months ago preparation was being made for amendment of the California constitution by initiative to be pushed by corporations desiring to invade the field of law practice, or to remain therein. A more sensational situation could not be imagined, for a battle over the proposed amendment would have meant the undermining of popular confidence alike in financial institutions and in the legal profession. Each could have told the people a great deal about the shortcomings of the other and the people, doubtless, would have relished the fight. The State Bar is said to have prepared for the contest with a large appropriation. Even with less expenditure than the banking, realty and automobile clubs could make, it probably would have won the fight. But on due consideration the State Bar and the California Bankers Association effected a treaty of peace to last until Jan. 1, 1936. (State Bar Journal, June, 1934, p. 142 *et seq.*) The reading of President Wyckoff's report on the matter leaves the impression that the understanding arrived at with the Bankers Association means abandonment of the attempt to provide by constitutional amendment that legal services, other than appearing in court, may be performed by lay persons and corporations "when . . . incidental or related to . . . the conduct of any lawful business in which such person may be engaged."

The Los Angeles Bar Association Bulletin dated July 19 tells of an almost equally sensational attack on the State Bar. It takes the form of an attempt to repeal the State Bar act by an initiative measure, which sets up a different type of organization for the Bar. The new plan appears to have originated among unsuccessful candidates for admission, though it will probably be supported by various interests which profit from unlawful practice. The plan provides for government of the bar by a board of seven members to be elected by delegates from county bar organizations. The matters of admission and discipline are virtually taken from the bar and vested in two boards of seven members each; the bar board is to ap-

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point three and the Judicial Council four. Beyond appointing a minority of the membership of the two auxiliary boards the bar has no hand in admission or discipline. The draft expressly makes it easier for unqualified applicants to get into the profession and practically destroys discipline because investigation of offenses is limited to the seven members of the board. Such a board would be just about as effective as the grievance committee of a state bar association—or, perhaps, less effective, for its findings would have to be concurred in by the Judicial Council before the old-style complaint could be filed in a trial court.

The aid offered to the mentally weak who aspire to be lawyers is expressed in the seventh section: any applicant for admission who did not receive a grade higher than 50 per cent in any examination since January, 1932, is allowed to take a "substantiating examination . . . which shall consist of 100 objective type questions [to be answered yes or no], known as a mental test, which need not all be, but shall consist principally of questions of law." For those not passed who receive a grade over 50 per cent another easy way for admission is provided. So it would appear that those unfit to be admitted and those who object to the enforcement of ethical standards are to be "given a break" and will be aided by all those laymen and corporations that want to practice without admission.

Miscellaneous

The annual meeting of the Fifth Judicial District Bar Association of the State of Minnesota was held in the city of Owatonna, Saturday night, May 5, 1934. About forty members were present; distinguished guests were Hon. Frank W. Murphy, President of the Minnesota State Bar Association; Hon. Charles Loring, Hon. Clifford L. Hilton, and Hon. Julius Olson, Associate Justices of the Supreme Court of Minnesota; Probate Judge Pearson of St. Paul.

Officers for the ensuing year were elected as follows: President, Harold S. Nelson, Owatonna; Vice-President, William W. Pye, Esq., Northfield; Secretary, Charles N. Sayles, Faribault; Treasurer, Otto J. Nelson, Owatonna; Member of the Board of Governors, G. P. Madden, Owatonna.

CHARLES N. SAYLES, Secretary.

National Polish Lawyers Declare Against Shysters

(From the Pittsburgh Legal News, Aug. 4)

The American Polish National Bar Association, four hundred strong, holding their annual convention at Cleveland this week, were welcomed by Sylvester V. McMahon, president of the Cleveland Bar Association, and Joseph L. Stern, president of the Cuyahoga County Bar Association.

Stephen Adamowski of Chicago, assistant state's attorney for Cook County, Illinois, who presided as vice president at the convention in the absence of President Chester Kendzierski, Wilkes-Barre, Pa., said:

"Our organization must draw up plans to augment those already used in the fight to protect our people. We have accomplished much in obtaining legislation to combat the menace, particularly in Illinois and Ohio. But the fight is just begun. Native Poles and other foreign-born are losing thousands of dollars annually as prey of shysters.

"Fake lawyers milk their unwitting clients by drawing up wills which won't hold water when put to a legal test, through execution of estates, in which they contrive to get most of the estates themselves, and through other extra-legal devices."

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Deposition time for the fall terms of court is at hand. With competent shorthand reporters who will provide a dependably accurate record, signature may be waived with safety and much time saved in filing. However much the actual presence of a witness at the trial may be desired, it is sometimes necessary to use a deposition. The handicap of written testimony is largely overcome by the satisfactory record produced by an experienced reporter. Members of the NATIONAL SHORTHAND REPORTERS ASSOCIATION are to be found in each state.

A. C. GAW, Secretary
Elkhart, Indiana

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Deaths of Members Reported to the Secretary's Office

Henry K. Davis, Federal Referee in Bankruptcy for the Southern District of New York, July 25.

John D. Grace, New Orleans, La., April 24.

Clifford G. Roe, Chicago, Ill., June 28.

Will H. Lyford, Chicago, Ill., May 16.

Jerome E. Wideman, New York City, May 5.

Glenn Willett, Washington, D. C., June 19.

Charles C. Keedy, Wilmington, Del., May 15.

Henry A. Lindsley, Denver, Col., May 18.

T. A. Farrell, Sacramento, Cal., June 10.

Frank B. Hodges, Syracuse, N. Y., April 21.

James B. Blake, Milwaukee, Wis., July 4.

Charles N. Campbell, Martinsburg, W. Va., May 19.

Fabian B. Dodds, Spokane, Wash., April 28.

William A. Hayes, Philadelphia, Pa., June 15.

Walter K. Sharpe, Chambersburg, Pa., May 16.

W. A. McIntyre, Grand Forks, N. D., June 23rd.

J. O. Muus, Grand Forks, N. D., April 20.

Fulton McMahon, Cambridge, Ohio, June 16.

J. B. Erb, New York City, June 7.

Judge Walter T. Couper, Binghamton, N. Y., June 1.

Raymond R. Ryan, Albuquerque, N. M., June 3.

Charles J. Tryon, Minneapolis, Minn., May 12.

Hon. George W. Buffington, Minneapolis, Minn., June 11.

George T. Dewey, Worcester, Mass., June 5th.

George P. Bagby, Baltimore, Md., June 3.

Judge A. M. J. Cochran, Maysville, Ky., June 12.

Charles W. Stiefel, Chicago, Ill., June 30.

David E. Watson, Indianapolis, Ind., June 13.

Webster A. Melcher, of Philadelphia, Pa., July 5.

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3730 Euclid Avenue
CLEVELAND

521 Fifth Avenue
NEW YORK